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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Robert A. West,

Petitioner

v.

Supreme Court of Colorado,

Respondent

On Petition For Writ Of Certiorari To The Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

The questions presented for review regard the Colorado Supreme Court's decision in case # 02SC242. In that decision, the Court made three findings that violate Petitioner's constitutional rights.

1. The Court invented and applied to Petitioner's subdivision, a new legal entity called an "implied common interest community."
2. Additionally, the Court held that the modification clause ("may change or modify any one or more of said restrictions") was "broad enough" to allow for the addition of a totally new and substantively different covenant.
3. Additionally, the Court held that the new covenant was valid.

These redundant findings materially changed the original design of Petitioner's subdivision from:

- A voluntary participation,
- Democratically organized,
- fully due process, fee simple ownership,
- covenant controlled community design,
- with exclusive covenant enforcement belonging to each property owner, and no Association being a party to the covenants.

to:

- a mandatory membership corporate controlled design,

- private governance with no due process,
- and with exclusive covenant enforcement belonging to a corporate board.

By written consent, the new covenant, was agreed to by 75% of the lot owners in Petitioner's subdivision, and must be imposed upon Petitioner and the other lot owners that did not agree and did not sign the written consent (new covenant) form (Appendix, Written Consent...). The restrictions in the new covenant forced membership and dues payments in a new Association and materially changed the property rights of all lot owners. The restrictions in the new covenant that Petitioner believes violate Title 7, Article 126, Part 1, 7-126-102 (2) of the Colorado Statutes (membership in non-profits), Article I, Section 10 of the Constitution, and his 1st, and 14th Amendment constitutional rights are as follows:

- "The Association may perform all duties and powers provided for in this declaration and contemplated for a lot owner's association for the Evergreen Highlands subdivision units 1 through 6."
- "All lot owners shall be members of the Association."
- "Each lot owner shall pay to the Association such dues adopted by the Association, as provided in the Articles of Incorporation and Bylaws."

- "The Association may impose and enforce liens against each lot for which dues are unpaid." (Appendix: Written Consent to Amend Protective Covenants for Evergreen Highlands - Unit 4)

Questions

1. When the Colorado Supreme Court held that a new covenant could be added to petitioner's original set of covenants, and since the covenant forced petitioner to relinquish covenant enforcement power to the private corporation without his consent, did the Colorado Supreme Court violate Article I: Section 10 of the U.S. Constitution, Title 7: Article 126, Part 1, 7-126-102 (2) of the Colorado Statutes, Petitioner's 1st Amendment right of free association, and Petitioner's14th Amendment rights of due process, right to property, and equal protection of the law?
2. When the Colorado Supreme Court invented and applied a new unprecedented legal concept called an "implied common interest community", to a subdivision in which Petitioner owns real property, did the Colorado Supreme Court violate Article I: Section 10 of the U.S. Constitution, Title 7: Article 126, Part 1, 7-126-102 (2) of the Colorado Statutes, Petitioner's 1st Amendment right of free association, and Petitioner's14th

Amendment rights of due process, right to property, and equal protection of the law?

3. When the Colorado Supreme Court enforced the new restrictive covenant in question by declaring it "valid", did the Court join with a private corporation to relieve petitioner of his right to enforce his covenants in a court if law regarding all subsequent internal property disputes in the subdivision and give that right of enforcement to a private corporation, effectively engaging in a private "taking" for private use and "taking" Petitioner's covenants permanently, and thereby violating Article II Bill of Rights, Section 14 of the Colorado Constitution, and Petitioner's 14th Amendment right to property and equal protection of the law, and Article I: Section 10 of the Constitution barring the making of any law impairing the obligation of contracts?
4. When the Colorado Supreme Court enforced the new restrictive covenant by declaring it "valid", forcing Petitioner to become a member of a non-profit Association without his consent, did the Colorado Supreme Court violate Petitioner's 1st Amendment right of free association and also violate Title 7: Article 126, Part 1, 7-126-102 (2) of the Colorado Statutes which prohibits membership in non – profit corporations without Petitioner's consent? And, in doing so thereby

deny Petitioner equal protection of the law guaranteed by the 14th Amendment?

5. When the Colorado District Court expressly declared that it had decided Petitioner's "quiet title" action in a way the Court thought the Colorado Supreme Court would decide the case; did the District Court deny Petitioner a District Trial Court decision and violate Petitioner's 14th Amendment right to due process?
6. When the Colorado Appellate Court expressly refused to consider Petitioner's claim that the District Court violated his 14th Amendment right of due process, did the Appellate Court violate Petitioner's 14th Amendment right of due process? And, by it's refusal did the Appellate court effectively prevent Petitioner from preserving his 14th Amendment issue on Certiorari, thereby violating Petitioner's 14th Amendment right to equal protection of the law?
7. When the Colorado Supreme Court excluded the consideration of 14th Amendment and other constitutional issues on Certiorari, did the Colorado Supreme Court violate Petitioner's 14th Amendment right to due process, and equal protection of the law?
8. When the Colorado Supreme Court refused to consider Petitioner's claims, in the petition for rehearing, that the District, Appellate, and

Supreme Courts all violated his 14th Amendment right to due process, did the Colorado Supreme Court, through it's refusal, also violate Petitioner's 14th Amendment right to due process, and equal protection of the law?

9. Both the District and Supreme Courts in the Colorado court system failed to understand the significant distinction between a "covenant" and a "restriction", using the words as if they were synonyms. Without this fundamental understanding of two real property concepts, the judges in the system did not comprehend the meaning of the words **"may change or modify any one or more of said restrictions."** Is such a failure to comprehend a fundamental real property legal distinction, a denial of due process and violation of Petitioner's 14th Amendment right to due process, and equal protection of the law?

List of Parties

Petitioner Robert A. West was the Plaintiff/Respondent below.

Respondent: State of Colorado, Colorado Supreme Court

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Sturges v. Crowninshield, 4 Wheat. 122, 197; Story, op. cit., § 1378.

Von Hoffman v. City of Quincy, supra, pp. 553, 554)

Jurisdiction

1) Date the judgment was entered: 6/16/03
2) Date the judgment on the petition for rehearing was entered: 7/21/03
3) Statutory Provision conferring jurisdiction: 28 U.S.C. Sec. 1257. - State courts; certiorari (a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where..... any ..... right, ... is ..... claimed under the Constitution .....

The rights claimed under the Constitution are:

- The 1st Amendment right of free association
- The 14th Amendment right to property
- The 14th Amendment right to due process
- The 14th Amendment right to equal protection of the law
- Article 1, Section 10: No law impairing the Obligation of Contracts.

Laws

From the Constitution of the United States, the Constitutional provisions are:

- U.S. Constitution: Article I, Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and reprisal; coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; **pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts**, or grant any Title of Nobility.

- U.S. Constitution: The 1st Amendment right of free speech and association

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

- U.S. Constitution: The 14th Amendment right to property
- U.S. Constitution: The 14th Amendment right to due process
- U.S. Constitution: The 14th Amendment right to equal protection of the law

Section 1. **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor**

deny to any person within its jurisdiction the equal protection of the laws.

The State Statutes

- CRS Title 7, Article 126, Part 1, 7-126-102 (2) of the Colorado Revised Statutes:

No person shall be admitted as a member without such person's consent.

- The Colorado Common Interest Ownership Act (CCIOA): CRS Title 38, Article 33.3

Editor's note: The provisions of this act are based substantially on the "Uniform Common Interest Ownership Act", as promulgated by the National Conference of Commissioners on Uniform State Laws.

The State Constitution

- Colorado Constitution: Article II, Bill of Rights, Section 14

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

- **Statement of the Case**

1. Trial Court

Plaintiff's testimony:

- Petitioner was a participating member of the former voluntary membership neighborhood Association terminated by the Colorado Secretary of State.
- Petitioner protested creation of a new mandatory membership Corporation, and **refused to become a member of the new Corporate Association.**
- Defendant's Brief restated Petitioner's no membership position.

Trial Court Decision:

- The Trial Court ignored the membership issue even though it was framed by Plaintiff's testimony, the Defendant's brief, and the covenant at issue. The Trial Judge's decision is made without reference to the membership issue, or to the 1st Amendment, or to Colorado legislation barring forced membership without consent (CRS Title 7, Article 126, Part 1, 7-126-102 (2)).
- The Trial Court declined to render a decision from the mind of the Trial Court Judge, preferring to decide as an interpreter of the mindset of the Supreme Court. (Appendix: Colorado Trial Court Decision (98CV3811) pg. 9 [12]).
- A 14th Amendment Due Process issue, a Colorado Constitution "takings" issue, a 14th Amendment "Takings" issue, a 1st Amendment "free association" issue, and a Colorado legislation barring membership without consent issue are created as a result of the Trial Court's Decision which adds State authority to a private decision and creates common law. The Court's actions which create these issues are:

1. Refusal to listen and decide the case on the merits as a Trial Court Judge. The Trial Court Judge stated both in his written decision and in his verbal delivery of his decision, that he "was going to decide the law in this case as he thought the Colorado Supreme Court would decide the law in the case."(Appendix: District Court Decision (98CV3811), pg. 9 [12]). Consequently, Plaintiff never received a hearing and judgment at the trial court level, from a trial court judge. Rather Plaintiff received a decision from an interpreter of the mindset of the Colorado Supreme Court. Petitioner believes this constitutes a denial of Due Process as required by the 14th Amendment.
2. Trial Court, through authorization of a new covenant, joined with a Private Corporation to take plaintiff's covenants (forced transfer of enforcement rights from plaintiff to a new Corporate Association). Petitioner believes this constitutes a denial of his 14th Amendment right to property.
3. Denial of Petitioner/Plaintiff's right to due process for all future disputes in the subdivision. The authorization of new covenant installs the corporation as a CIC homeowner association with all covenant enforcement rights, forces all property owners to be members, and therefore all property disputes become internal matters of the corporation to be settled by a corporate board and not in a court of law. Plaintiff can no longer proceed in a court of law, and there is no due process requirement in any private

corporation. Plaintiff thereby looses his 14th Amendment right to due process.

4. By declaring the covenant (containing clause that "all property owners shall be members (Appendix, Written Consent)) a valid covenant, the Trial Court violated Plaintiff's 1st Amendment right to free association and Plaintiff's right to free association in non-profits guaranteed by Colorado statute CRS Title 7, Article 126, Part 1, 7-126-102 (2): which bars membership in a non-profit without express consent. The Court thereby denies Petitioner equal protection of the law.

2. Appellate Court

Appellate Court finds unanimously in favor of Petitioner but declines to consider Petitioner's 14th Amendment issue (Appendix: Colorado Court of Appeals: Appellant's Opening Brief). Appellate Court misunderstood that a14th Amendment issue did not materialize until the District Trial Court, through its decision, sided with the Association, thereby providing state authority for private actions and authorizing everything sought by the Corporation in the new covenant.

3. Colorado Supreme Court on Certiorari

- The Colorado Supreme Court, Frames the issues on Certiorari to exclude all U.S. Constitutional issues (Petition for Writ of Certiorari Granted (02SC242)).
- The Colorado Supreme Court, with knowledge of the Appellate Court decision, ignored the failure of the Appellate court to confront the 14th Amendment issues, and failed to do so itself.
- The Colorado Supreme Court, possessing the full trial court record, ignored the membership

issue even though it was framed by Plaintiff's testimony and Defendant's trial brief, and by the covenant at issue. The Supreme Court's decision is made without reference to the membership issue or to the 1st Amendment, or to the Colorado legislation barring forced membership without consent.

- Several 14th Amendment Due Process issues, a 1st Amendment "free speech and association" issue, and Colorado legislation barring membership without consent 14th Amendment equal protection issues are created as a result of the Supreme Court's Decision.
- The Colorado Supreme Court, through authorization of the new covenant, joined with a Private Corporation to take plaintiff's covenants (forced transfer of enforcement rights from plaintiff to Corporate Association). Thus creating a14th Amendment "takings" and a 14th Amendment right to property issue, and a U. S. Constitution: Article I, Section 10 impairment of contract obligations issue.
- The Colorado Supreme Court, through authorization of the new covenant, Denies Plaintiff's right to due process for all future disputes within the subdivision. Authorization of the new covenant essentially installs the new corporation with all covenant enforcement rights, forces all property owners to be members, and therefore all property disputes become internal matters of the corporation to be settled by a corporate board and not in a court of law. Plaintiff can no longer proceed in a court of law, and there is no due process requirement in any private corporation. This generates a U. S.

Constitution: Article I, Section 10 impairment of contract obligations issue, a 14th Amendment "Taking" of property (covenants) issue, and a 14th Amendment right to due process and equal protection of the law issue.

- By declaring the covenant (containing clause that "all property owners shall be members) a valid covenant, the Supreme Court violated Plaintiff's 1st Amendment right to free association and Petitioner's right to free association in non-profits guaranteed by Colorado CRS Title 7, Article 126, Part 1, 7-126-102 (2), which bars membership in a non-profit without consent. This denied Petitioner of his 14th amendment right to equal protection of the law.
- 14th Amendment: "Takings." Using the Restatement of Property concept of an implied power to collect fees to maintain "common areas" in clearly defined Common Interest Communities, the Colorado Supreme Court invented and applied a new unprecedented legal concept and called it an "Implied Common Interest Community." The Colorado Supreme Court then applied the concept to a clearly defined covenant controlled community subdivision design where there was no Association that was a party to lot owner covenants, and the original Association design is voluntary and not mandatory. The Court then proclaimed that such a covenant controlled community subdivision design was not what it seemed, and that in fact the subdivision was really an Implied Common Interest Community. The net effect of the Supreme Court's design of an unprecedented

legal concept and the illogical application of the concept to a covenant controlled community subdivision design, was a "taking" of Petitioner's covenants in violation of the 14th Amendment, a denial of Petitioner's right to Due Process in all future internal subdivision property disputes, and an interference with Petitioner's established contractual rights and obligations that is prohibited by the U. S. Constitution: Article I, Section 10.

4. The Colorado Supreme Court on Petition for rehearing:

The Colorado Supreme Court was alerted, in the petition for rehearing, of:

- the failure of the Appellate Court to consider the 14th Amendment due process issue that materialized as a result of the District Trial Court's decision,
- the failure of the Supreme Court to listen to Petitioner's constitutional claims,
- the consequence of the Supreme Court Authorization of the covenant which removes enforcement power and due process from Petitioner as owner of the property.

The Colorado Supreme Court Denies the Petition for rehearing (Appendix: Petition for rehearing denied (02SC242)) on July 21, 2003, thereby refusing to consider any of Petitioner's pleas for consideration of his U. S. Constitutional rights.

Arguments in favor of granting a writ of Certiorari

This case affords the Supreme Court with an opportunity to fix several problems with one ruling.

Obligation of contracts

This constitutional issue (U. S. Constitution, Article 1, Section 10) is being raised in this petition for a Writ of Certiorari because it is a consequence of the Supreme Court of Colorado's decision. It became an issue when the Colorado Supreme Court decided against Petitioner, made new common law in Colorado, and subsequently denied Petitioner's Petition for Rehearing. It is closely related to the taking of covenants issue, described in Petitioner's Petition for Rehearing (Appendix: Petition for Rehearing ... , pg 1).

An important reason for the Court to grant Certiorari is to clarify that the community conversions currently taking place across our country, invariably interfere with private contractual obligations (U. S. Constitution, Article 1, Section 10). In Covenant Controlled Communities, there may be a voluntary membership neighborhood association, but there is never a mandatory membership homeowner association. Additionally, only residential property owners are a party to a set of restrictive covenants, and only the individual property owner can enforce the covenants in a court of law.

Equally important is Petitioner's constitutional right to his/her established contractual obligations. When Petitioner purchased his property, that purchase included land, a house, and a **contract** known as a set of "covenants that run with the land", to which only residential lot owners were a party. While the covenants serve to restrict Petitioner's behavior and use of the land, they equally guarantee the same response by his neighbors, who are a party to the covenants. Restricted

behavior is one type of "obligation" of the contract. The other type of "obligation" is also a "substantial right." That is the right to contract/covenant enforcement, whereby one property owner seeks adherence to the contract by another property owner through an action in a court of law. The property owners that purchased these contracts are the "means" whereby both the obligations and the enforcement of the contract are satisfied.

When the Colorado Supreme Court enforced the new restrictive covenant (which gave covenant enforcement rights to a corporate association that never purchased any covenants) by declaring it "valid and binding" (02SC242, IV. Conclusion), the Court relieved petitioner of his "substantial right" and "obligation" to enforce his covenants in a court of law regarding all subsequent internal property disputes in the now corporate subdivision. In effect, the Colorado Supreme Court joined with a private corporation to "take" part of Petitioner's covenants permanently, and interfere with Petitioner's "obligation" to enforce his covenants by giving the right of enforcement to a corporate board, for all future property disputes internal to the subdivision. The consequence of the Colorado Supreme Court's simple act of authorization was multi-dimensional.

- First, when the Colorado Supreme Court found the new covenant to be "valid" (02SC242, IV CONCLUSION), and/or declared the subdivision in which Petitioner owns property to be an "implied common interest community", it agreed to the replacement of Petitioner with a Corporate Board as enforcer of Petitioner's covenants. The Colorado Supreme Court thereby interfered with a fundamental contract "obligation" and "substantial right" belonging to Petitioner and no one else. Petitioner believes this interference to be a clear violation of Article 1, Section 10 of the U. S. Constitution.

- Second, since having legal standing to enforce a contract is a fundamental component of ownership of that contract, when the Colorado Supreme Court found the new covenant to be "valid" (02SC242, IV CONCLUSION), and/or declared the subdivision in which Petitioner owns property an "implied common interest community", and agreed to the replacement of Petitioner with a Corporate Board as enforcer of Petitioner's covenants, it effectively removed Petitioner as the "means" of enforcement leaving him with only the "obligation" to abide by the restrictions. Servitude and enforcement are equally important components of the contract/covenants, and even the removal of one component is nothing less than "taking" part of Petitioner's property. It is worse than a trespass, for it removes a component of property from Petitioner's possession altogether. Thus, it seems to Petitioner that by finding the new covenant "valid", and/or by declaring the subdivision in which Petitioner owns property an "implied common interest community", the Colorado Supreme Court violated Article 1, Section 10 of the U. S. Constitution, and by doing so also denied Petitioner his 14th Amendment right to equal protection of the law.

The U. S. Supreme Court has held that, the "obligation of a contract is not impaired by a law modifying the remedy for its enforcement, but not so as to impair substantial rights secured by the contract." (Home Building & Loan Assn. v. Blaisdell
No. 370 SUPREME COURT OF THE UNITED STATES 290 U.S. 398 P. 430.) And, regarding the "means" of enforcement, the Court provides additional guidance. **"The obligation of a contract is "the law which binds the parties to perform their agreement." Sturges v. Crowninshield, 4 Wheat. 122, 197; Story, op. cit., § 1378.**

This Court has said that the laws which subsist at the time and place of the making of a contract, and where it [p*430] is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.

Von Hoffman v. City of Quincy, supra, pp. 553, 554, the general statement above quoted was limited by the further observation that

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances."

Therefore, it seems to Petitioner that even if there is an honest desire on the part of a majority of property owners in a Covenant Controlled Community, to convert that community to a corporate Common Interest Community, such a conversion can only be achieved with unanimous consent, when every property owner agrees to change the rights and obligation in his/her covenant contract.

Social Agenda

One more pressing argument for granting a Writ of Certiorari is the social question and the social agendas attendant to this case. In this country we live in a republic but we aspire to democracy. But, eternal vigilance is the price we must pay because both can be lost without a shot being fired. [1] There is a social agenda being pursued today, throughout the suburban unincorporated areas in this country. It is an insidious movement to convert democratically organized, contractual based, subdivisions called covenant controlled communities into private corporate governments that exclude fundamental civil rights. The democratic covenant controlled communities, intentionally designed and legally recognized, offer more than just a balance between the rigid and non-democratic micromanagement of corporate homeowner associations and the free-for-all insecurity that characterizes fee-simple ownership in unincorporated areas. They also offer the kind of democratic living experience envisioned by our founding fathers. While the suburban landowner may be different from the agrarian owner in many ways, an important commonality is that personal ownership and caring for land in a community and having the social and democratic experiences and responsibilities attendant to such ōwnership, promotes spontaneous and voluntary community participation, commitment, and individual civic responsibility. People, who live democracy, know democracy, and they do not need a textbook. This living experience is fundamental to democracy in America. If we loose this grass roots experience we loose the cement in the

[1] "Now the two of them (Hitler & Papen) presented the old field marshal with a decree they wanted him to sign. Hindenberg skimmed through the pages. Then, he signed. It was the death sentence on what little still remained of German Democracy. For this decree suspended the civil liberties embodied in the Weimar constitution and inaugurated the police state." (Weimar Germany Democracy on Trial: 943.085,Delmer, Sefton).

broad based foundations of our communities and any hope for democracy.

This is precisely what is lost in corporate homeowner association or common interest communities. Invariably, these designs are based on a variant of the Hitler corporate model, now a national standard (CCIOA). These are "let George do it" communities, where a small insider board manages both its own group persistence and the land use and living style decisions of all the residents, with covenant cops and an absolute power and lack of civil rights over which a despot would drool in envy(CCIOA).

The insidious conversion from covenant controlled to corporate controlled community, is accomplished in much the same way as in the death of the Weimar Republic, and as the facts of this case show. The conversion occurs, not with a shot, but with a signature that erases the civil rights of the affected, and with the democratic State as both a party to the action, and a party to eventually bringing about it's own demise.

Democratic covenant controlled communities are under attack,[2] and State courts are one of the participants in predation. The State has no business in participating in the destruction of contractually based democratic communities, and certainly has no business in the promotion of private corporate based governance that excludes basic civil rights. These democratic communities need help to survive. They need some affirmative action on the part of the U. S. Supreme Court. They need the Court to affirm that which it did not affirm in SHELLEY v. KRAEMER. They need confirmation that covenants, even with State sanction, are

[2] About 2000 with 450,000 residents in Colorado (02SC242, footnote 3, pg 6)

invalid if they violate 14th Amendment rights to property, or U. S. Constitution: Article 1, Section 10. The Court said long ago that "State judicial action is not immunized from operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." (SHELLEY v. KRAEMER). Also, the Court said, "The power of state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." (SHELLEY v. KRAEMER).

The time is right for the U. S. Supreme Court to rule that, State sanctioned covenants or rulings that purport to create corporate common interest communities, and remove from the property owner his/her right to enforce his/her covenants within the community, deprive citizens of their property without due process of law, deprive citizens of equal protection of the law, and interfere with established obligations of contracts.

Freedom of Association

When the Colorado Supreme Court enforced the new restrictive covenant in question by declaring, "We hold that the 1995 amendment to the Evergreen Highlands restrictive covenants was valid and binding....., and hold that Respondent is bound by the terms of the 1995 amendment to the Evergreen Highlands covenants" (02SC242, IV CONCLUSION), the Court forced Petitioner to become a member of a non-profit Association without his consent. Weather or not the "membership" issue was properly framed in the District Trial Court, "ignorance of the law is no excuse", and the Colorado Trial and Supreme Courts cannot violate Colorado State Statutes in promulgating their decisions. Such violations deny citizens equal protection of the laws and violate the 14th Amendment.

When the Colorado Supreme Court enforced the new restrictive covenant by declaring it "valid", and/or declared the subdivision in which Petitioner owns property an "implied common interest community", thereby forcing Petitioner to become a member of a non-profit Association without his consent, the Colorado Supreme Court violated Title 7, Article 126, Part 1, 7-126-102 (2) of the Colorado Statutes which prohibits membership in non – profit corporations without consent. This constituted a failure to provide Petitioner equal protection of the law guaranteed by the 14th Amendment.

When a state sanctioned conversion of subdivision design takes place, and it is not unanimous, the dissenting property owners are forced to become members in an association with which they may have deep psychological, social, and political disagreements. In this case, Petitioner raised the membership issue in his testimony, Defendant raised the membership issue in its brief, and the issue was present in the new covenant in question. Petitioner is protected from forced membership by CRS Title7, Article 126, Part1, 7-126-102 (2) and by the 1st Amendment of the U.S. Constitution. In July of 1998, and before this litigation was commenced, CRS Title7, Article 126, Part1, 7-126-102 (2) went into effect. So, petitioner believes this State law is controlling. However, if it is claimed that it is not controlling because the new covenant was passed and recorded in 1993, then Petitioner offers the following rulings in support of his assertion.

- **Procedural or remedial change not retroactive.** "Application of a statute to a subsisting claim for relief does not violate the prohibition of retroactive legislation where the statute effects a change that is only procedural or remedial in nature." **Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982); Davis v. Board of Psychologist Examiners, 791 P.2d 1198 (Colo. App. 1989)**

- "Application of a statute is not rendered retroactive and unlawful merely because the facts upon which it operates occurred before adoption of the statute." **Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982)**

Regarding the 1st Amendment it is clear that the Court has also recognized a right not to associate.

"Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. E. g., Elrod v. Burns, 427 U.S. 347, 355 -357 (plurality opinion); Cousins v. Wigoda, 419 U.S. 477, 487 ; Kusper v. Pontikes, 414 U.S. 51, 56 -57; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 -461. [431 U.S. 209, 234] Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. E. g., Elrod v. Burns, supra, at 357-360, and cases cited; Perry v. Sindermann, 408 U.S. 593 ; Keyishian v. Board of Regents, 385 U.S. 589 . The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

One of the principles underlying the Court's decision in Buckley v. Valeo, 424 U.S. 1 , was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a

contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," id., at 22, the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests," id., at 23. 30

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. 31 For at the heart of the First Amendment is the [431 U.S. 209, 235] notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565 ; Cantwell v. Connecticut, 310 U.S. 296, 303 -304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642.

These principles prohibit a State from compelling any individual to affirm his belief in God, Torcaso v. Watkins, 367 U.S. 488 , or to associate with a political party, Elrod v. Burns, supra; see 427 U.S., at 363 -364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." (ABOOD v. DETROIT BOARD OF EDUCATION).

The Colorado Supreme Court apparently has no qualms about using the research and analysis based assertions from the Restatement of Property in place of legal precedent to make new law. The court reasoned that if the Restatement thought highly about implied rights to collect fees in CICs, then it should think equally highly of the more bold position of implying the existence of an entire CIC wherever some vacant land exists in a covenant controlled community. The Restatement of Property is not law. Using a construct that has no basis in more than 700 years of property law to replace a contractual community with a private corporation makes the Court an accomplice in the corporate takeover of private property rights by a private corporation. Petitioner believes that such a decision that lends the power and authority of the State to a private action, and makes new common law that interferes with established contractual rights, with no legal precedent, is a violation of the U. S. Constitution: Article 1, Section 10, Petitioner's 1st Amendment right of free association, and Petitioner's14th Amendment rights of due process and right to property.

Admonish a dysfunctional court system

Another argument in favor of granting a writ of certiorari is for the U.S. Supreme Court to seize an opportunity if not to fix, then at least to send a message to a State court system that is in disrepair. The litigation processing facts of this case show a Colorado court system that is provincial regarding its judicial mission, has become a political instrument of the few, is incapable of protecting both the state and federal constitutional rights of citizens, and has certainly lost its way in the judicious application of 700 years of property law. In this case the Supreme Court of Colorado invented and invoked law as it saw fit, in order to extend legislation beyond legislative intention (Petition for rehearing, pg 8 [4.]),

and in order to promote the conversion of a legitimate legally proven, democratic, and contractually based form of community association, to a private corporate form of governance, without the consent of 25% of the subdivision property owners, and without regard to their constitutional rights to property, freedom of association, due process, and contract obligations. The following facts portray a pattern of neglect.

When the Colorado District Court expressly declared **"12. It is the Court's responsibility to determine Colorado law applicable to this case by determining what the Colorado Supreme would decide is the law in this case when and if the issues contained herein reach the Court."(98CV3811).** The District Court declared that it had decided Petitioner's "quiet title" action in a way the Court thought the Colorado Supreme Court would decide the case. Petitioner asserts that the Colorado District Court Judge was wrong. It was not the District Court's responsibility to telepathically "read the minds" of the Supreme Court Judges who entered no testimony and in no way provided any direction in this case. It was the District Court Judge's responsibility to apply his knowledge of 700 years of covenant law, his knowledge of 200 years of United States Constitutional law, and his knowledge of Colorado State Constitutional and statutory law, to formulate Colorado law applicable to the case, and construct a decision that would stand well on its merits on appeal. Unfortunately and apparently, to Plaintiff/Petitioner, the District Court Judge was more concerned with his image and reputation in a politicized judicial system than in producing a fair, just, and legally sound decision. The District Court failed to listen to Petitioner as a District Trial Court, and gave a decision that was unwarranted and violated Petitioner's 14th Amendment right to property and due process. Due Process is not simply "having a hearing", for if everyone is asleep or otherwise preoccupied with self-image,

or political correctness, what if anything, can be heard? In the very first step in the Colorado Judicial system, Petitioner's 14th Amendment right to Due Process was violated.

When the Colorado Appellate Court expressly refused to consider Petitioner's claim that the District Court violated his 14th Amendment rights (Colorado Court of Appeals: Appellant's opening Brief, pg10-11, 21, 23), the Appellate Court thereby violated Petitioner's 14th Amendment right of due process. And, by it's refusal effectively prevented Petitioner from preserving his 14th Amendment issue on Certiorari thereby also denying Petitioner's 14th Amendment right to equal protection of the law. In the second step in this Colorado Judicial system, Petitioner's 14th Amendment right to Due Process was violated.

When the Colorado Supreme Court excluded the consideration of 14th Amendment issues on Certiorari (Appendix, Petition for Writ of Certiorari Granted), it violated Petitioner's 14th Amendment right to due process, and equal protection of the law. In this third step in the Colorado Judicial system, the Colorado Supreme Court violated Petitioner's 14th Amendment right to Due Process and equal protection of the law.

When the Colorado Supreme Court denied to consider Petitioner's claim, in the Petition for Rehearing, that the Appellate Court and the District Court violated his 14th Amendment right to due process, the Colorado Supreme Court again violated Petitioner's 14th Amendment right to due process, and equal protection of the law. In this very last step in the Colorado Judicial system, Petitioner's 14th Amendment right to Due Process was denied.

In every Court of the Colorado Judicial System Petitioner failed to obtain recognition as an American citizen through

recourse to the law. The 14th Amendment declares proudly, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (U. S. Constitution, 14th Amendment). For Petitioner, the net result of the litigation that he commenced in an effort to protect his home, and his property (including his covenants) from a corporate takeover by his neighbors, is the loss of his property rights, and the loss of his Colorado and U. S. Constitutional rights. If the facts of this case do not cry out for some form of Judicial System correction, Petitioner wonders just how dire must disregard get to finally elicit some form of remedial action?

The Colorado Supreme Court's denial of Petitioner's pleas to consider his 14th Amendment issues, seem to demonstrate little care or understanding that a Court's decision authorizing a private action is the equivalent of the State government doing the act itself, and that constitutional restrictions inure to the government act that do not attach to the private act. The U. S. Supreme Court has stated, "The action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the Fourteenth Amendment." (SHELLEY v. KRAEMER), and that "In applying rule of Erie v. Tompkins, common-law rules enunciated by state courts in judicial opinions are part of state law." (SHELLEY v. KRAEMER). The Court also affirmed "State action in violation of the Fourteenth Amendment is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in absence of statute." (SHELLEY v. KRAEMER), and that "State judicial action is not immunized from operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." (SHELLEY v. KRAEMER). That said, it would seem prudent for the Colorado Supreme Court to acknowledge

some degree of consideration of Petitioner's constitutional rights.

This case is an opportunity for the Supreme Court of the United States to inform the Colorado Supreme Court and the State of Colorado of the above-mentioned consequences, and to reaffirm that the citizens of Colorado are also citizens of the United States with constitutional rights that must be respected and protected by the State Courts. "State courts are obligated to enforce principles of federal law that become applicable during the course of an adjudication of state claims." (Martin v. Hunter's Lessee). Additionally, since "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."(14th Amendment), rulings reached by State Courts without due consideration of the consequence that ruling has regarding the personal rights of citizens elaborated in the U. S. Constitution, are rulings that do not provide equal protection of the law.

"Ignorance of the law is no excuse"

Both the District and Supreme Courts of the Colorado court system failed to comprehend the significant distinction between a covenant and a restriction, using the words interchangeably as if they were synonyms. This fundamental misunderstanding of two key real property legal concepts impaired the judge's comprehension of the meaning of the words **"may change or modify any one or more of said restrictions."** Those who cannot measure cannot manage, and those who cannot understand cannot judge. Petitioner believes that this failure to listen and comprehend resulted in a denial of due process and violation of Petitioner's 14th Amendment right to due process, and equal protection of the law.

Appendix

Petition for rehearing denied (02SC242)

Supreme Court Decision (02SC242)

Appellate Court Decision (00CA1586)

Trial Court Decision (98CV3811)

Petition for Rehearing to the Colorado Supreme Court

Colorado Court of Appeals: Appellant's Opening Brief

Petition for Writ of Certiorari Granted (02SC242)

Written Consent to Amend Protective Covenants for Evergreen Highlands - Unit 4

ANNOUNCEMENTS

COLORADO SUPREME COURT

MONDAY, JULY 21, 2003

"Slip opinions" are the opinions as filed by the judges with the clerk. Slip opinions are subject to modification, rehearing, withdrawal, or clerical corrections. A link (in the htm format only) to any modifications to previously posted opinions will appear in the petition for rehearing section of the announcement document the day the changes are announced.

Click on the case number to view the opinion in Word format.

OPINIONS

NONE

PETITIONS FOR REHEARING

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 00CA1586	Case No. 02SC242
Petitioner: EVERGREEN HIGHLANDS ASSOCIATION, a Colorado non-profit corporation, v. **Respondent:** ROBERT A. WEST.	
Petition for Rehearing DENIED. EN BANC. JUSTICE KOURLIS and JUSTICE HOBBS do not participate.	

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 00CA1586	Case No. 02SC242
Petitioner: EVERGREEN HIGHLANDS ASSOCIATION, a Colorado non-profit corporation, v. Respondent: ROBERT A. WEST.	
JUDGMENT REVERSED AND CASE REMANDED EN BANC JUNE 16, 2003	

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JUSTICE RICE delivered the Opinion of the Court.
JUSTICE KOURLIS and JUSTICE HOBBS do not participate.
JUSTICE COATS concurs only in the judgment of the court and Part III. A. of the majority opinion.

I. INTRODUCTION

We granted certiorari in this case to determine whether, pursuant to the modification clause of the Evergreen Highlands Subdivision covenants, the requisite majority of lot owners may "change or modify" the existing covenants by the addition of a new covenant which: (1) requires all lot owners to be members of the homeowners association, (2) assesses mandatory dues on all lot owners in the subdivision to pay for the maintenance of common areas, and (3) imposes liens on those lots whose owners fail to pay the mandatory dues.

The district court held that such an amendment was valid and binding. The court of appeals reversed, finding that the modification clause of Evergreen Highlands' covenants did not allow for the addition of a wholly new covenant, but only for the modification of existing covenants. We now reverse the court of appeals, holding that the addition of a new covenant falls within the permissible scope of the modification clause of the Evergreen Highlands covenants.

We also granted certiorari on the related question of whether, in the absence of a covenant imposing mandatory dues, the homeowners association has the implied power to collect assessments from all lot owners to pay for the maintenance of common areas of the subdivision. Although Petitioner counterclaimed on this issue in the trial court, the court never reached the merits of the argument because it upheld the actual modification of the covenant; the court of appeals reversed on the same ground. The issue was nevertheless preserved for certiorari review, and we now hold that the declarations for Evergreen Highlands were sufficient to create a common interest community by implication with the concomitant power to impose mandatory dues on lot owners to pay for the maintenance of common areas of the subdivision. We accordingly remand the issue to the court of appeals with orders to return it to the trial court for

calculation of Petitioner's damages in a manner consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

Petitioner Evergreen Highlands Association, a Colorado non-profit corporation ("Association"), is the homeowner association for Evergreen Highlands Subdivision – Unit 4 ("Evergreen Highlands") in Jefferson County. The subdivision consists of sixty-three lots, associated roads, and a 22.3 acre park area which is open to use by all residents of the subdivision. The Association holds title to and maintains the park area, which contains hiking and equestrian trails, a barn and stables, a ball field, a fishing pond, and tennis courts. The park area is almost completely surrounded by private homeowners' lots, with no fence or other boundary separating the park area from the homes. Respondent Robert A. West owns one of the lots bordering directly on the park area, and has used the facilities there to play tennis, fish, and walk his dog.

Evergreen Highlands Subdivision was created and its plat filed in 1972. The plat indicated that the park area was to be conveyed to the homeowners association. Protective covenants for Evergreen Highlands were also filed in 1972, but did not require lot owners to be members of or pay dues to the Association. The Association, however, was incorporated in 1973 for the purposes of maintaining the common area and facilities, enforcing the covenants, paying taxes on the common area, and determining annual fees. The developer conveyed the park area to the Association in 1976. Between the years of 1976 and 1995, when the modification of the covenants at issue in this case occurred, the Association relied on voluntary assessments from lot owners to pay for maintenance of and improvements to the park area. Such expenses included property taxes, insurance for the park

area and its structures, weed spraying, tennis court resurfacing, and barn and stable maintenance.

Article 13 of the original Evergreen Highlands covenants provides that a majority of lot owners may agree to modify the covenants, stating in relevant part as follows:

> [T]he owners of seventy-five percent of the lots which are subject to these covenants may release all or part of the land so restricted from any one or more of said restrictions, or may change or modify any one or more of said restrictions, by executing and acknowledging an appropriate agreement or agreements in writing for such purposes and filing the same in the Office of the County Clerk and Recorder of Jefferson County, Colorado.

Protective Covenants for Evergreen Highlands – Unit 4, art. 13 (Nov. 6, 1972) (emphasis added) (hereinafter "modification clause"). In 1995, pursuant to the modification clause, at least seventy-five percent of Evergreen Highlands' lot owners voted to add a new Article 16 to the covenants. This article required all lot owners to be members of and pay assessments to the Association, and permitted the Association to impose liens on the property of any owners who failed to pay their assessment. Assessments were set at fifty dollars per year per lot.

Respondent purchased his lot in 1986 when membership in the Association and payment of assessments was voluntary, a fact that Respondent contends positively influenced his decision to purchase in Evergreen Highlands. Respondent was not among the majority of homeowners who approved the 1995 amendment to the covenants, and he subsequently refused to pay his lot assessment. When the Association threatened to record a lien

against his property, Respondent filed this lawsuit challenging the validity of the 1995 amendment. The Association counterclaimed for a declaratory judgment that it had the implied power to collect assessments from all lot owners in the subdivision, and accordingly sought damages from West for breach of the implied contract.[1] The district court ruled in favor of the Association on the ground that the amendment was valid and binding; therefore, it never reached the merits of the Association's counterclaims.

The court of appeals reversed, finding that the terms "change or modify" as set forth in the modification clause of the covenants did not allow for the addition of a wholly new covenant, but only for modifications to the existing covenants. The court examined two divergent lines of cases from other states and concluded that the particular language used in Evergreen Highlands' modification clause supported the more restrictive interpretation, based on the principle that courts should resolve any ambiguities in covenant language in favor of the free and unrestricted use of property. West v. Evergreen Highlands Ass'n, 55 P.3d 151, 154 (Colo. App. 2001). The court of appeals did not address the issue of whether the Association had the implied power to collect assessments from lot owners, and therefore whether Respondent was in breach of an implied contract. We granted certiorari[2] and now reverse and remand.

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[1] The Association also counterclaimed that West was unjustly enriched; this issue was not appealed to us.

[2] We granted certiorari on the following issues:

1. Where a planned community's covenants empower a certain percentage of the owners to "change or modify any one or more" of the covenants, may the specified percentage of owners adopt a covenant requiring all owners to pay assessments to the homeowner association?

2. Does a planned community's homeowner association have the implied power to collect assessments from all owners to defray the cost of maintaining common areas?

III. ANALYSIS

Interpretation of a covenant is a question of law requiring de novo review. Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., 21 P.3d 860, 862 (Colo. 2001). Courts must construe covenants as a whole based upon their underlying purpose, but will enforce a covenant as written if clear on its face. Id. Ambiguities will be resolved in favor of the free and unrestricted use of property. Id.; see also Newman v. Wittmer, 917 P.2d 926, 929 (Mont. 1996) (noting that although ambiguities should be resolved in favor of the unrestricted use of property, "the free use of the property must be balanced against the rights of the other purchasers in the subdivision.").

We begin our analysis by examining the modification clause of the Evergreen Highlands covenants in order to determine if its scope is broad enough to allow for the addition of a wholly new covenant by the requisite majority of property owners. Because this is an issue of first impression in Colorado, we examine cases from other jurisdictions interpreting similar covenant modification language. We conclude that the terms "change" and "modify," as used in the Evergreen Highlands covenants, are expansive enough to allow for the addition of a new covenant. We hold that the 1995 amendment to the Evergreen Highlands covenants, approved by the requisite majority of lot owners, is valid and binding on all lot owners in Evergreen Highlands. We therefore reverse the court of appeals.

We next examine the question of whether the Association has an implied right to levy assessments against lot owners in order to maintain common areas of the subdivision. Although many subdivisions have covenants which mandate the payment of assessments for this purpose,

others, such as Evergreen Highlands, do not.[3] Without the implied authority to levy assessments, these latter communities are placed in the untenable position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so. In order to avoid the grave public policy concerns this outcome would create, we today adopt the approach taken by many other states as well as the Restatement of Property, which provides that "the power to raise funds reasonably necessary to carry out the functions of a common interest community will be implied if not expressly granted by the declaration." Restatement (Third) of Property: Servitudes § 6.5 cmt. b (2000). We therefore hold that, even in the absence of an express covenant mandating the payment of assessments, the Association has the implied power to levy assessments against lot owners in order to raise the necessary funds to maintain the common areas of the subdivision.

A. Modification Clause of the Evergreen Highlands Covenants

The Association argues that the court of appeals erred when it held that the language of the Evergreen Highlands' modification clause only provided for "changes to the existing covenants, not the creation and addition of new covenants that have no relation to the existing covenants." West v. Evergreen Highlands Ass'n, 55 P.3d 151, 154 (Colo. App. 2001). Specifically, the Association argues that the word "change" is broad enough to encompass not only the modification of existing covenants, but the addition of new covenants as well. Based on our analysis of the language used in the Evergreen Highlands' modification clause, as well as the prevailing case law from other states, we agree.

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[3] Amicus Curiae Community Associations Institute, a national nonprofit research and education organization, estimates that approximately 2,000 Colorado communities, housing an estimated 450,000 people, fall into the latter category.

1. The Lakeland Line of Cases

The court of appeals adopted the line of cases following Lakeland Property Owners Association v. Larson, 459 N.E.2d 1164 (Ill. App. Ct. 1984). That case involved a situation nearly identical to the present one, in which a majority of lot owners voted to add a new covenant creating mandatory assessments and vesting the homeowner association with the power to impose liens for non-payment. Interpreting very similar covenant modification language (allowing a majority of the property owners to "change the said covenants in whole or in part," id. at 1167), the court disallowed the adoption of the new covenant. It held that "[t]he provision ... clearly directs itself to changes of existing covenants, not the adding of new covenants which have no relation to existing ones." Id. at 1169. The Lakeland reasoning has been adopted by other states.

In Caughlin Ranch Homeowners Association v. Caughlin Club, 849 P.2d 310 (Nev. 1993), a subdivision's original covenants imposed assessments only on residential parcels, although the modification clause provided for amendment of the rates. A year after the covenants were filed, a commercial club was developed and began operations on the property. Some six years later, after control of the homeowners association had passed from the developer to the lot owners, the homeowners association amended the covenants to levy assessments against the commercial parcel. Basing its reasoning on Lakeland, the Nevada Supreme Court disallowed the amendment, holding that the covenant modification clause allowing "amendments" referred only to "amendments of existing covenants as opposed to the creation of new covenants unrelated to the original covenants." Id. at 312.

In Boyles v. Hausmann, 517 N.W.2d 610, 613 (Neb. 1994), the modification clause allowed the majority of the homeowners to "change [the covenants] in whole or in part." The plaintiffs' lot was allegedly rendered unbuildable when

the requisite majority of the homeowners association amended an existing covenant to increase the setback requirements. The Boyles court disallowed the additional covenant because, even though the restriction was appended onto an existing covenant, it was "new and different." Id. at 616.

Finally, in Meresse v. Stelma, 999 P.2d 1267 (Wash. Ct. App. 2000), the covenants for a six-lot subdivision allowed a majority of the lot owners "to change or alter them [the covenants] in full or in part." Id. at 1269. Five of the lot owners voted to alter the covenants to increase the access road easement, thereby stripping the sixth lot owner of a portion of his property. The court disallowed the amendment, holding that the amendatory language of the covenants "does not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim." Id. at 1273-74.

2. The Zito Line of Cases

Despite the fact that the Lakeland reasoning has been followed by other courts as recently as 2000, the same court that decided Lakeland issued a contrary opinion in 1992 with little explanation.[4] In Zito v. Gerken, 587 N.E.2d 1048 (Ill. App. Ct. 1992), existing subdivision covenants granted the homeowners association the authority to modify the covenants, although the exact language of the modification clause is not provided. The homeowners association adopted mandatory assessments and disgruntled homeowners sued. This time, however, the Illinois Appellate Court held in favor of the homeowners association, holding that: "[a] restrictive covenant which has been modified, altered or amended will

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[4] Zito was issued by a different division of the Illinois Appellate Court with only a "but see" reference to the earlier ruling in Lakeland, to wit:

> "The trial court, therefore, erred when it failed to enforce the 1987 amendment to the restrictive covenants. But see Lakeland Property Owners Ass'n v. Larson [citation omitted]."

Zito, 587 N.E.2d at 1050.

be enforced if it is clear, unambiguous and reasonable"; "[t]he 1987 amendment does not seek to change the character of [the subdivision] or to impose unreasonable burdens upon any lot owners"; and "the terms and conditions of the 1987 amendment impose a minimal collective burden upon the residents." Id. at 1050.

In Sunday Canyon Property Owners Association v. Annett, 978 S.W.2d 654 (Tex. Ct. App. 1998), the modification language allowed the covenants, upon a majority vote of the lot owners, to be "waived, abandoned, terminated, modified, altered or changed." Id. at 656. Based on this language, the court allowed the requisite majority to adopt an amendment creating a homeowners association levying mandatory lot assessments. The court held that, despite the fact that the creation of the homeowners association

> exceeded the original purpose of the right to amend contemplated by purchasers prior to the amendment, it is of no moment. Recognized long ago was the right of persons ... to contract with relation to their property as they see fit in the absence of contraventions of public policy and positive law. That right is derived from ownership of the property, and embraces the ability to impose on the property restrictive covenants and to abrogate or modify them.

Id. at 658 (citations omitted).

Finally, in Windemere Homeowners Association, Inc. v. McCue, 990 P.2d 769 (Mont. 1999), a majority of homeowners voted to amend the covenants to create a homeowners association authorized to levy the costs of road maintenance against property owners. Basing his argument on Lakeland, Caughlin, and Boyles, plaintiff homeowner challenged the amendment as an impermissible new covenant. The court, however, held that the modification clause in these covenants was "markedly different" than

those in Lakeland and its progeny; specifically, the clause, like that in Sunday Canyon, allowed a majority of property owners to "waive[], abandon[], terminate[], modify[], alter[], or change[]" the covenants. Id. at 773. Consequently, the court held that this amendatory language was "broad enough" to justify the amendment. Id.

3. Application to the Evergreen Highlands Covenants

As this summary of cases from other jurisdictions illustrates, there exists a split in the law with respect to this issue. Respondent contends that these cases can be distinguished by how narrowly or broadly the particular modification clause is written, and argues that the amendatory language in Evergreen Highlands' covenants is much more akin to the narrow language found in the Lakeland line of cases than the more expansive language found in the Zito line of cases. He therefore argues that the Lakeland reasoning should prevail here.

There is little substance to the distinction between the "broad" or "narrow" amendatory language upon which Respondent relies. The covenant modification language in Lakeland and Boyles allowed a majority of lot owners to "change" the covenants, 459 N.E.2d at 1167, 517 N.W.2d at 613, and in Meresse to "change or alter" the covenants. 999 P.2d at 1269. The amendatory language in Sunday Canyon and in Windemere, however, provided that the covenants could be "waived, abandoned, terminated, modified, altered or changed." 978 S.W.2d at 656; 990 P.2d at 772. In the latter cases, the first three words --"waived, abandoned, and terminated" -- all deal with ending a covenant, not adding a new one, and are therefore inapplicable here. The last three words -- "modified, altered, or changed" -- are the same as those in the Lakeland line of cases, with the addition of "altered," which is simply a synonym for "change" and "modify." Thus, distinguishing these cases from one another

based on the breadth of the language used is an artificial, and ultimately unpersuasive, distinction.

Moreover, from a linguistic standpoint, the Lakeland conclusion that "change or modify" can only apply to the alteration of existing covenants, and not the addition of new and different ones, is not well-founded. Webster defines "change" as "to make different." Webster's Third New International Dictionary 373 (1986); see also Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n, 223 Cal. Rptr. 175, 179 (Cal. Ct. App. 1986) ("the words 'changed' and 'modified' include any alteration whether involving an increase or decrease."). Applying this definition to the language at issue, covenants could certainly be changed or made different either by the addition, subtraction, or modification of a term. Confining the meaning of the term "change" only to the modification of existing covenants, then, seems illogically narrow.

For these reasons, we find the court of appeals' reliance on a linguistic analysis to distinguish covenant modification language unsatisfactory. We instead conclude that the different outcomes in the Lakeland and Zito lines of cases are based on the differing factual scenarios and severity of consequences that the cases present. In those cases where courts disallowed the amendment of covenants, the impact upon the objecting lot owner was generally far more substantial and unforeseeable than the amendment at issue here. See, e.g., Caughlin Ranch, 849 P.2d 310 (covenants previously imposing assessments only on private lots amended to assess the sole commercial parcel in the subdivision at a substantially higher rate); Boyles, 517 N.W.2d 610 (changed setback requirement rendered plaintiff's lot unbuildable); Meresse, 999 P.2d 1267 (increased access road easement deprived plaintiff of a portion of his private lot).

In contrast, Zito, Windemere, and Sunday Canyon, like this case, all specifically considered -- and allowed -- the amendment of covenants in order to impose mandatory

assessments on lot owners for the purpose of maintaining common elements of a subdivision. We accordingly find the Zito line of cases more applicable to the situation here. This interpretation also avoids the absurd result that could follow from application of the Lakeland reasoning; Evergreen Highlands would be unable to adopt a mandatory-assessment covenant when its original covenants were silent on the subject, yet could adopt such a covenant if its original covenants had expressly prohibited a mandatory-assessment covenant.

Moreover, the amendment at issue in this case was changed according to the modification clause of the original Evergreen Highlands covenants, and it is undisputed that Respondent was on actual notice of that clause when he purchased his lot in 1986. In addition, we note that, at fifty dollars per year, the mandatory assessment imposed on Respondent is neither unreasonable nor burdensome.[5] To the contrary, the existence of a well-maintained park area immediately adjacent to Respondent's lot undoubtedly enhances Respondent's property value.

We conclude that the modification clause of the Evergreen Highlands covenants is expansive enough in its scope to allow for the adoption of a new covenant, and hold that the 1995 amendment to the Evergreen Highlands covenants, passed by the requisite majority of lot owners, is valid and binding on all lot owners in Evergreen Highlands.

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[5] By way of comparison, the amendment approved in Zito provided for lot assessments at $100 per year. 587 N.E.2d at 1049. The amendment approved in Sunday Canyon imposed an open-ended annual assessment for the maintenance and improvement of the roads, water system, and common areas; for providing architectural control over lot improvements; and for promoting "the health, welfare, and safety of the residents." 978 S.W.2d at 656. Finally, the amendment approved in Windemere created a homeowners association that was responsible for maintenance, repair, reconstruction, and snow removal on the common subdivision road, and allowed the association to assess lot owners for the paving of the road. 990 P.2d at 771.

B. The Implied Power of Homeowners Associations to Impose Mandatory Dues on Lot Owners for the Maintenance of Common Areas

The Association additionally argues that, even in the absence of an express covenant imposing mandatory assessments, it has the implied power to collect assessments from its members. To this end, the Association brought a counterclaim against West for breach of an implied contract obligating him to pay a proportionate share for repair, upkeep, and maintenance of the common area. The Association now argues that, based on West's breach of the implied contract, it is entitled as a matter of law to collect the unpaid assessments from Respondent.

We agree. Our review of case law from other states, the Restatement of Property (Servitudes), and the declarations for Evergreen Highlands in effect when West purchased his property, as supported by our understanding of the purpose of the Colorado Common Interest Ownership Act ("CCIOA"),[6] convinces us that such an implied power exists in these circumstances. We therefore hold that Evergreen Highlands is a common interest community by implication, and that the Association has the implied power to levy assessments against lot owners to provide for maintenance of and improvements to common areas of the subdivision.

This being a question of first impression in Colorado, we first examine case law from other jurisdictions and find it largely in concurrence with our holding. When faced with this issue, a substantial number of states have arrived at the conclusion that homeowner associations have the implied power to levy dues or assessments even in the absence of express authority. See, e.g., Spinnler Point Colony Ass'n, Inc. v. Nash, 689 A.2d 1026, 1028-29 (Pa. Commw. Ct.

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[6] CCIOA is located at sections 38-33.3-101 through 38-33.3-304, 10 C.R.S. (2002).

1997) (holding that where ownership in a residential community allows owners to utilize common areas, "there is an implied agreement to accept the proportionate costs for maintaining and repairing these facilities."); Meadow Run & Mountain Lake Park Ass'n v. Berkel, 598 A.2d 1024, 1026 (Pa. Super. Ct. 1991) (same); Seaview Ass'n of Fire Island, N.Y., Inc. v. Williams, 510 N.E.2d 793, 794 (N.Y. 1987) (holding that when lot purchaser has knowledge that homeowners association provides facilities and services to community residents, purchase creates an implied-in-fact contract to pay a proportionate share of those facilities and services); Perry v. Bridgetown Cmty. Ass'n, Inc., 486 So.2d 1230, 1234 (Miss. 1986) ("A landowner who willfully purchases property subject to control of the association and derives benefits from membership in the association implies his consent to be charged assessments and dues common to all other members."). But see Popponesset Beach Ass'n, Inc. v. Marchillo, 658 N.E.2d 983, 987-88 (Mass. App. Ct. 1996) (holding that where lot owner had no notice in his chain of title of assessments and had not used the common areas, there existed no implied-in-fact contract to pay past and future assessments).[7]

Reflecting this considerable body of law, the newest version of the Restatement of Property (Servitudes) provides that "a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community...." Restatement (Third) of Property: Servitudes § 6.5(1)(a) (2000). In addition, as explained in a comment to that section, the power to levy assessments "will be implied if not expressly granted by the declaration or by statute." Id. at § 6.5 cmt. b; see also Wayne S. Hyatt, Condominium and Homeowner Association Practice:

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[7] We note that in contrast to Marchillo, testimony in this case showed that West had, in fact, availed himself of the benefits of the park area.

Community Association Law 36 (1981) ("The assessment is not equivalent to membership dues or some other discretionary charge .... As long as legitimate expenses are incurred, the individual member must bear his or her share.").

We find the Restatement and case law from other states persuasive in analyzing the issue before us today. In addition, these authorities are in harmony with the legislative purpose motivating the enactment of CCIOA. See, e.g., § 38-33.3-102(1)(b), 10 C.R.S. (2002) ("That the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowner associations ... through enhancing the financial stability of associations by increasing the association's powers to collect delinquent assessments"); § 38-33.3-102(1)(d) ("That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such homeowner associations").

Respondent, however, argues that the implied power to mandate assessments can only be imputed to "common interest communities," which both CCIOA and the Restatement define as residential communities in which there exists a mandatory obligation or servitude imposed on individual owners to pay for common elements of the community.[8] Respondent therefore contends that because the

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[8] CCIOA defines a "common interest community" as:

> real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration ....

§ 38-33.3-103(8), 10 C.R.S. (2002).

The Restatement defines a "common interest community" as:

> a real estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

original covenants did not impose such a servitude, Evergreen Highlands is not a common interest community, and accordingly cannot have the implied power to levy assessments against its members pursuant to these authorities.

Respondent's argument, however, relies on the assumption that the servitude or obligation to pay which would have defined Evergreen Highlands as a common interest community was required to have been made express in the covenants or in his deed. This assumption is incorrect. CCIOA provides only that the obligation must arise from the "declarations," which are defined as "any recorded instruments however denominated, that create a common interest community, including any amendments to those instruments and also including, but not limited to, plats and maps." § 38-33.3-103(13), 10 C.R.S. (2002); see also Restatement (Third) of Property: Servitudes § 6.2(5)(2000) ("'Declaration' means the recorded document or documents containing the servitudes that create and govern the common-interest community.").

The declarations in effect for Evergreen Highlands in 1986 incorporated all documents recorded up to that date, and included not only: (1) the covenants, but also; (2) the 1972 plat, which noted that the park area would be conveyed to the homeowners association; (3) the 1973 Articles of Incorporation for the Association stating that the Association's purposes were to "own, acquire, build, operate, and maintain" the common area and facilities, to pay taxes on

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> (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
> (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

Restatement (Third) of Property: Servitudes § 6.2(1)(a) and (b) (2000).

same, and to "determine annual membership or use fees"; and (4) the 1976 deed whereby the developer quit-claimed his ownership in the park area to the Association.

At the time Respondent purchased his lot in 1986, the Evergreen Highlands' declarations made clear that a homeowners association existed, it owned and maintained the park area, and it had the power to impose annual membership or use fees on lot owners. These declarations were sufficient to create a common interest community by implication. As explained by the Restatement:

> An implied obligation may ... be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions. When such an implied obligation is established, the lots are a common-interest community within the meaning of this Chapter.

Restatement (Third) of Property: Servitudes § 6.2 cmt. a (2000); see also id. at illus. 2 (citing an example virtually identical to that of Evergreen Highlands and finding it a common interest community by judicial decree).

We accordingly adopt the position taken by the Restatement and many other states, and hold that the declarations for Evergreen Highlands were sufficient to create a common interest community by implication. The Association therefore has the implicit power to levy assessments against lot owners for the purpose of maintaining the common area of the subdivision. Respondent, as a lot owner, has an implied duty to pay his proportionate share of the cost of maintaining and operating the common area. We therefore remand the case to the court of appeals with orders to return it to the trial court to calculate Petitioner's damages in a manner consistent with this opinion.

IV. CONCLUSION

We hold that the 1995 amendment to the Evergreen Highlands restrictive covenants was valid and binding because its terms were within the scope of the modification clause of the original covenants, and it was duly enacted by the requisite majority of property owners. We reject the court of appeals' conclusion that the language of the modification clause allowing a majority of the property owners to "change or modify" a covenant does not provide for the addition of a new covenant, but only for the modification of an existing covenant. We therefore reverse the court of appeals, and hold that Respondent is bound by the terms of the 1995 amendment to the Evergreen Highlands covenants.

We also hold that the declarations for Evergreen Highlands in effect when Respondent purchased his property in 1986 were sufficient to create a common interest community by implication with the concomitant power to impose assessments or dues against individual lot owners. We therefore remand the case to the court of appeals with orders to return it to the trial court for calculation of Petitioner's damages in a manner consistent with this opinion.

JUSTICE KOURLIS and JUSTICE HOBBS do not participate.

JUSTICE COATS, concurring only in the judgment of the court and Part III. A. of the majority opinion.

Evergreen Highlands Association v. West, 02SC242

JUSTICE COATS, concurring only in the judgment of the court and Part III. A. of the majority opinion:

I agree with the majority's determination that the Evergreen Highlands covenants permitted the adoption of the 1995 amendment by 75 percent of the lot owners and that the trial court was justified in finding the amendment binding on all lot owners, whether they voted for it or not. Because the amendment is an express covenant providing for the imposition of mandatory assessments, I would not address the hypothetical question whether the Association would have the implied power to collect assessments in the absence of such an express provision. I would especially not, under these circumstances, legislate a new category of common-interest community and impute powers to that entity, as I believe the majority does.

Whether or not it was adequately preserved for appeal, the Association's alternate argument concerning implied powers was addressed by neither the district nor the appellate court below. In light of this court's finding of a valid, express covenant providing for the imposition of mandatory assessments, resolution of the implied powers question is not only unnecessary but actually premised upon a condition held by the court not to exist in this case. Perhaps most importantly, however, in its attempt to formulate and announce a new rule of general applicability (unanchored by its effect on the outcome of any existing case or controversy), the majority needlessly construes Colorado's Common Interest Ownership Act and the American Law Institute's restatement of the law concerning common-interest communities, and does so in a way that, in my opinion, is at least questionable.

Unsurprisingly, other jurisdictions have found on occasion, in the particular circumstances of individual cases,

an implied power of a community to levy mandatory assessments on individual lot owners, flowing from an implied-in-fact contract. See maj. op. at 18-19. Without restricting those fact-specific holdings in any way, the Restatement suggests the more general concept of a "common-interest community," defined by certain common characteristics, from which its powers, including the implied power to levy assessments, necessarily flow. While its definition is perhaps broader than that of Colorado's Common Interest Ownership Act,[9] even the Restatement would categorize as a "common-interest community" only a development or neighborhood in which individually owned lots are burdened by a servitude that imposes an obligation to support common property or pay assessments to an association with the responsibility of maintaining it or enforcing servitudes on the property in the development. See Restatement (Third) of Property: Servitudes § 6.2 (2000).

The Restatement specifically emphasizes that "[i]t does not purport to authorize the imposition of assessments by property- owner groups that are not common-interest communities." Id. at § 6.5 cmt. a. Although it makes no attempt to describe all of the circumstances under which a qualifying servitude might be found, the Restatement imputes the power of assessment as a general matter only to communities in which membership in the association is mandatory or the individual lots are so burdened. Rather than suggesting that all residential developments or neighborhood organizations necessarily have the power of assessment, the Restatement merely finds that a power of assessment is implied from the need to enforce existing servitudes on individual lots.

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[9] "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. § 38-33.3-103(8), 10 C.R.S. (2002).

In relying on the Restatement as authority for its broad notion of a "common interest community by implication," the majority, in my view, needlessly dilutes the necessary characteristics of a common-interest community from which its inherent powers derive and injects a kind of circularity into its reasoning. If the declarations in this case actually "made clear that a homeowners association . . . had the power to impose annual membership or use fees on lot owners," maj. op. at 22-23, without their voluntary participation, injecting the general concept of a common-interest community would seem to be superfluous. The power to levy assessments on lot owners would already be express, or at least be clearly implied by the particular provisions of the declarations. And to the extent that the majority's expansive definition of "declarations," as including the Association's Articles of Incorporation, is dependent upon their character as "governing documents" of a common-interest community, the servitude necessary to create the common-interest community in the first place certainly could not be inferred from the articles themselves.

Even if I considered guidance from this court to be both important and appropriate in some situations, I would nevertheless be reluctant to give it were I to find no greater clarity or consensus concerning the applicable legal principles than I find here. I fear that the majority's discussion of implied powers of assessment is likely to raise more questions than it resolves. Because I consider this dictum to be both gratuitous and highly questionable, I would omit it altogether. I therefore concur only in the judgment of the court and Part III. A. of the majority opinion.

COLORADO COURT OF APPEALS

Court of Appeals No. 00CA1586
Jefferson County District Court No. 98CV3811
Honorable Tom Woodford, Judge

Robert A. West,

Plaintiff-Appellant,

v.

Evergreen Highlands Association, a Colorado non profit corporation,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE NEY
Metzger and Taubman, JJ., concur

November 23, 2001

Stephen A. Groome, Conifer, Colorado, for Plaintiff-Appellant

Winzenburg, Leff, Purvis & Payne LLP, Lawrence B. Leff, Carey Gunn Helm, for Defendant-Appellee

Plaintiff, Robert A. West, appeals the judgment entered in favor of defendant, Evergreen Highlands Association, declaring valid a restrictive covenant affecting his real property. We reverse and remand.

This case concerns property located in Evergreen Highlands Subdivision – Unit 4, in Jefferson County. In 1972, protective covenants for the subdivision were recorded in Jefferson County. Paragraph 13 of those covenants stated that:

> These covenants shall run with the land and shall bind all parties and all persons claiming under them for a period of ten years from the date of filing . . . and shall automatically be continued thereafter for successive periods of ten years each; provided, however, that the owners of seventy-five percent of the lots which are subject to these covenants . . . may change or modify any one or more of said restrictions, by executing and acknowledging an

appropriate agreement . . .
(emphasis added).

In 1982, an amendment to the protective covenants was filed with Jefferson County. The recitals to the amendment indicated that paragraph 13 of the 1972 covenants allows for "amendment" of the protective covenants.

Nothing in the 1972 protective covenants or in the 1982 amendment thereto provided for membership in the association, assessment of dues, or the power to subject subdivision property to a lien for the nonpayment of dues.

Subsequently, in 1986, plaintiff purchased real property located in the subdivision. He purchased his property subject to the 1972 protective covenants and to the 1982 amendment thereto.

In December 1995, defendant recorded a document entitled "Written Consent to Amend Protective Covenants for [the Subdivision] Prepared and Recommended by the Evergreen Highlands Association." It was signed by seventy-five percent of the subdivision lot owners, but not by plaintiff. This document purported to add a "new" article 16 to the protective covenants, which, among other things, required all lot owners in the subdivision to be members and pay dues to defendant and subjected the subdivision lots to liens for nonpayment of dues.

Defendant subsequently notified plaintiff that it would record a lien against his property for nonpayment of annual dues pursuant to article 16. In response, plaintiff filed this action seeking to have the 1995 written consent document declared invalid.

The court ruled that the covenant contained in the 1995 written consent document was valid and enforceable against plaintiff. This appeal followed.

I.

Plaintiff contends that the trial court erred in interpreting paragraph 13 of the 1972 protective covenants to allow seventy-five percent of the subdivision lot owners to add a new restrictive covenant, binding all the property owners in the subdivision, when such restrictions were not addressed in either the 1972 protective covenants or the 1982 amendment thereto. We agree.

Construction of a covenant is a question of law that requires de novo review. Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., 21 P.3d 860 (Colo. 2001).

When interpreting a restrictive covenant, courts will enforce it as written if it is clear on its face. When interpreting an unclear covenant, courts resolve all doubts against the restriction and in favor of free and

unrestricted use of the property. Buick v. Highland Meadow Estates at Castle Peak Ranch, Inc., supra.

The language at issue from paragraph 13 of the 1972 protective covenants provides that "owners of seventy-five percent of the lots . . . may change or modify any one or more of said restrictions." Plaintiff's position is that the 1995 amendment improperly adds article 16 to the protective covenants, when the 1972 protective covenants only allow existing covenants to be changed or modified by seventy-five percent of the lot owners.

Both parties agree this issue is one of first impression in Colorado.

A.

Plaintiff refers us to cases from other jurisdictions in which covenants allowing future modification or amendment were narrowly drafted. He argues that in those cases such narrowly drafted covenants, like paragraph 13 here, have been construed against restriction of property rights. We find those cases persuasive.

For example, in Lakeland Property Owners Ass'n v. Larson, 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984), the court held that the language "to change the said covenants in whole or in part" did not permit the addition of a new covenant allowing a homeowners association to collect mandatory dues. The court concluded that the "provision permitting the change of covenants . . . clearly directs itself to changes of existing covenants, not the

adding of new covenants which have no relation to existing ones." Lakeland Property Owners Ass'n v. Larson, supra, 459 N.E.2d at 1169. See also Boyles v. Hausmann, 517 N.W.2d 610, 613 (Neb. 1994)(ruling that the language to "change same in whole or in part" did not allow a majority of homeowners to adopt covenants restricting the uses of the relevant property because they were new and different from the existing covenants); Meresse v. Stelma, 999 P.2d 1267, 1269 (Wash. Ct. App. 2000)(ruling that the language providing that existing covenants remain in effect until "majority vote of the then owners agree to change or alter them in full or in part" did not allow adoption of a new restrictive covenant that relocated an access road, because the covenant differed in nature from the existing covenants).

Here, the trial court relied on Windemere Homeowners Ass'n v. McCue, 990 P.2d 769, 772 (Mont. 1999), in which the court found that the language providing that covenants could be "waived, abandoned, terminated, modified, altered or changed" was broad enough to authorize a new covenant not contemplated in the original restrictive covenants. See also Sunday Canyon Property Owners Ass'n v. Annett, 978 S.W.2d 654, 658 (Tex. App. 1998)(finding a valid modification of the restrictive covenants, creating a mandatory property owners association, under the rationale that a majority of the lot owners could "contract with relation to

their property as they see fit in the absence of contraventions of public policy and positive law").

The trial court also relied on Ticor Title Insurance Co. v. Rancho Santa Fe Ass'n, 177 Cal. App. 3d 726, 732, 223 Cal. Rptr. 175, 178 (1986), in which the court reviewed language providing that any of the covenants may be "changed or modified" by approval of two-thirds of the lot owners. The homeowners association there argued that, with regard to an existing setback requirement, the "change or modify" language would only apply to a reduction, and not an increase, in the setback requirement. The court in Ticor Title ruled that the words "changed" and "modified" include any alteration, whether involving an increase or decrease; thus, the court presumed that two-thirds of the lot owners must approve any change or modification (i.e., any increase or decrease) in the setback requirement.

We are not convinced that the opinions relied upon by the trial court apply to the facts here. The language at issue in Windemere Homeowners Ass'n v. McCue, supra -- "waived, abandoned, terminated, modified, altered or changed" -- is significantly broader than the language at issue here. In addition, we do not consider Ticor Title Insurance Co. v. Rancho Santa Fe Ass'n, supra, relevant here, because the setback to be modified in that case was an existing restriction, as opposed to a new and unrelated restriction, as is at issue in this case.

Thus, we conclude that Lakeland Property Owners Ass'n v. Larson, supra, is persuasive and applicable to the facts presented here. The language in that case -- "to change the said covenants in whole or in part" -- is similar in scope to the language in this case -- "change or modify any one or more of said restrictions." Moreover, "any doubt relative to the meaning and application of the covenant must be resolved in favor of the unrestricted use of property." Dunne v. Shenandoah Homeowners Ass'n, 12 P.3d 340, 345 (Colo. App. 2000).

Therefore, we follow the reasoning and interpretation set forth in Lakeland Property Owners Ass'n v. Larson, supra, that the amendment provision only allows changes to the existing covenants, not the creation and addition of new covenants that have no relation to the existing covenants.

Accordingly, our de novo interpretation of paragraph 13 of the 1972 protective covenants is that the plain and clear language of "change or modify" means that only a pre-existing covenant, related in subject matter, may be altered by seventy-five percent of the lot owners. Our review of the 1972 protective covenants, and the 1982 amendment thereto, does not reveal a restriction or covenant regarding membership in a homeowners association or payment of dues that could, in turn, be changed or modified by seventy-five percent of the lot owners.

Thus, we conclude that the trial court erred in interpreting paragraph 13 of the 1972 protective covenants to allow seventy-five percent of the subdivision lot owners to add article 16 as a new restrictive covenant requiring mandatory membership and mandatory dues and granting defendant the power to subject the property to liens for nonpayment of the dues.

B.

On appeal, defendant argues that plaintiff was on either actual or constructive notice of the restrictions contained in article 16, via documents or references in his chain of title. Specifically, defendant relies on the subdivision plat, which indicated that the park areas in the subdivision were to be conveyed to the homeowners association; the subsequent deeds conveying the park property; and defendant's articles of incorporation, which state that one of defendant's purposes is to maintain the park areas and determine annual membership and fees. Defendant thus argues that plaintiff was on notice of the possibility of change in existing restrictions and that the amended covenant making membership and fees mandatory simply reflected matters of which he was already on notice as a resident of the subdivision. Defendant argues that, as such, the trial court properly interpreted paragraph 13 of the 1972 protective covenants.

We are unpersuaded by defendant's argument that simply because plaintiff was on notice of the existence of

a homeowners association, as a result, seventy-five percent of the lot owners could amend the covenants to make membership and payment of dues in a homeowners association mandatory.

Defendant also relies upon the 1982 amendment, which in its recitals indicated that paragraph 13 of the 1972 protective covenants allowed for the "amendment" of the covenants by seventy-five percent of the lot owners and that all of the lot owners in the subdivision were members of the association. The recital in the 1982 amendment -- which in defendant's view authorizes "amendment" of the 1972 protective covenants -- cannot, in and of itself, expand or change the restrictions on the ability to modify contained in the 1972 protective covenants. See § 38-35-107, C.R.S. 2001.

Additionally, we note that the 1982 amendment does not provide for membership in the association, the setting of dues, or liens for nonpayment.

Even assuming, arguendo, that the recitals in the 1982 amendment served to expand the right to modify the protective covenants by seventy-five percent of the lot owners, by describing that right as the right to "amend," we would still conclude that only a pre-existing covenant could be modified or amended by seventy-five percent of the lot owners and, as such, made applicable to all lot owners in the subdivision. See, e.g., Caughlin Ranch Homeowners Ass'n v. Caughlin Club, 849 P.2d 310, 312 (Nev. 1993)(provision allowing for "amendment" refers

to the amendment of "existing covenants as opposed to the creation of new covenants unrelated to the original covenants").

II.

Plaintiff also contends that the trial court's interpretation of the 1972 protective covenants constitutes a wrongful impairment or taking of his property rights in violation of the Fourteenth Amendment.

Because the record indicates that this constitutional argument was not raised in the trial court, we will not consider it here for the first time on appeal. City & County of Denver v. Desert Truck Sales, Inc., 837 P.2d 759 (Colo. 1992).

Judgment reversed and the case is remanded with directions to enter judgment in favor of plaintiff, declaring invalid article 16 of the 1995 "Written Consent to Amend Protective Covenants for [the Subdivision] Prepared and Recommended by the Evergreen Highlands Association."

JUDGE METZGER and JUDGE TAUBMAN concur.

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case No.98 CV 3811 Division 8

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT
ROBERT A. WEST,

Plaintiff,

v.

EVERGREEN HIGHLANDS ASSOCIATION, a Colorado non-profit corporation,

Defendant,

This matter came on for a one day bench trial on April 4, 2000. The Court heard testimony from Plaintiff, Robert A. West and from Larry Johnson, a former member of the Board of Directors of the Evergreen Highlands Association. Both parties stipulated to the authenticity and admission of all Exhibits. The Court admitted into evidence all of Plaintiff's Exhibits 1-11 and all of Defendant's Exhibits A-R. The Court incorporates by reference the parties' Exhibits. The Court reviewed each party's Trial Brief, as well as many of the cases cited

therein and at trial by the parties. Both parties stipulated that there exists no Colorado appellate opinions on point in this matter. The Court also reviewed and *relied* upon the parties' Stipulated Facts contained in the Trial Management Order in reaching its decision.
Based upon the stipulated facts and evidence, the undisputed allegations of the pleadings, the evidence heard and presented at trial, and the parties' Trial Briefs and the cases cited therein and during trial, the Court enters the following Findings of Fact, Conclusions of Law and Order for Judgment:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The Court finds and concludes that all of the parties' Stipulated Facts contained in the Trial Management Order are facts and are stated as follows:

a. Since February 28, 1986, Plaintiff has owned the real property described as Lot 23, Evergreen Highlands Unit 4, County of Jefferson, State of Colorado (the "Plaintiff's Property"). Evergreen Highlands Unit 4 is a subdivision platted in 1972 and located in Jefferson County, Colorado.

b. Plaintiff purchased his property subject to Protective Covenants For Evergreen Highlands Unit 4 (the "1972 Protective Covenants"), recorded with the Jefferson County Clerk and Recorder on November 6, 1972.

c. Paragraph 13 of the 1972 Protective Covenants reads as follows:

"These covenants shall run with the land and shall bind all parties and all Persons claiming under them for a period of ten years from the date of filing in the Office of the County Clerk and Recorder of Jefferson County, Colorado, and shall automatically be continued thereafter for successive periods of ten years; provided, however, that the owners of seventy-five per cent of the lots which are subject to these covenants may release all or part of the land so restricted from any one or more of said restrictions, or may change or modify anyone or more of said restrictions, by executing and acknowledging an appropriate agreement or agreements in writing for such purposes and filing same in the Office of the County Clerk and Recorder of Jefferson County, Colorado."

d. On February 10, 1982, a document entitled "Amendment to Declaration of Protective Covenants For Evergreen Highlands Unit 4" (the "1982 Amendment") was recorded with the Jefferson County, Colorado, Clerk and Recorder.

e. Plaintiff purchased his property subject to the 1982 Amendment.

f. Defendant is the EVERGREEN HIGHLANDS ASSOCIATION, a Colorado Nonprofit Corporation, which purports to be the

homeowners' association for the lot owners in the Evergreen Highlands Unit 4 subdivision.

g. On or about December 29, 1995, at Reception No. FO16538, Defendant caused to be recorded with Jefferson County, Colorado, Clerk and Recorder a document entitled I'WRITTEN CONSENT TO AMEND PROTECTIVE COVENANTS FOR EVERGREEN HIGHLA.NDS -UNIT 4 PREPARED AND RECOMMENDED BY THE EVERGREEN HIGHLA.NDS ASSOCIATION" (the 111995 Amendment").
h. The 1995 Amendment was not signed by Plaintiff.
i. The 1995 Amendment purports to add a new Article 16 to the existing covenants, doing the following:
    1) Authorize the Association to enforce the covenants as amended:
    2) Require all lot owners to be members of the Association:
    3) Require all lot owners to pay dues to the Association:
    4) Authorize the Association to place liens against lots for non-payment of dues;
    5) Authorize the Association to use dues to enforce the covenants and maintain common facilities;

6) Authorize the Association to adopt rules and regulations for park area use by all lot owners.

j. Defendant is attempting to enforce the provisions of the 1995 Amendment. It has notified the Plaintiff via certified letter that the Defendant's Bylaws require it to record a lien against the Plaintiff's Property unless the Plaintiff pays the Defendant annual dues.

2. The deed by which Plaintiff obtained title contained language that the Property was free and clear of all encumbrances except taxes, "and assessments due and payable subsequent to the date hereof."

3. Unit 4 of the Evergreen Highlands Subdivision was platted on May 30, 1972. The plat recited that there was a park area which was to be conveyed to the homeowners' association. The plat contains a Paragraph 9 in the dedication area which states, Figure 9. park area, to be conveyed to the homeowners' association." The plat for the subdivision also refers to covenants recorded in the Jefferson County Clerk and Recorder's Office, but the plat does the not include the recording date of the covenants. The Court finds and concludes that Plaintiff had notice to look for covenants and to determine their effect by reason of these covenants being recorded in the Jefferson County Clerk and Recorder's Office. The

recorded covenants recite that they are to run with the land.

4. A nonprofit corporation known as Evergreen Highlands Association was formed. The nonprofit corporation homeowners' association was dissolved by the Colorado Secretary of State for failing to file its corporate papers and later reincorporated. The Court finds and concludes that it is not germane to this case that the nonprofit corporation homeowners' association was dissolved by the Colorado Secretary of State and later reincorporated.

5. The crux of this lawsuit is over Paragraph 13 of the 1972 Covenants, originally recorded in 1972. The identical paragraph is also set forth in the 1982 Amendment, recorded in 1982. (As reflected in Exhibit 1 of Plaintiffs Exhibits). This Paragraph 13 states, "These covenants shall run with the land and shall bind all parties and all persons claiming under them for a period of ten years from the date of filing in the offices of the County Clerk and Recorder of Jefferson County, Colorado, and shall automatically be continued for successive periods of ten years." Both the 1972 Covenants and the 1982 Amendment provide that the owners of 75 percent of the lots which are subject to these covenants may release all or part of the land so restricted from anyone or more of said restrictions or may change or modify anyone or more of said restrictions by executing and acknowledging an appropriate agreement or agreements in writing for such

purposes and filing same in the Office of the County Clerk and Recorder of Jefferson County, Colorado."

6. Plaintiff objected to the covenants as set forth in the 1982 Amendment because the document was only signed by one person, the President of the Evergreen Highlands Association, to evidence the consent to the amendment of the 1972 Covenants. Although only signed by one person, the 1982 Amendment recites that 75 percent of all lot owners were in agreement as to the amendment of the 1972 Covenants. The Court finds and concludes that it is not a defect of any weight or anything to be considered in this case that only one person, the President of the Evergreen Highlands Association, signed the 1982 Amendment. The Court further finds and concludes that because the 1982 Amendment recites that 75 percent of all lot owners agreed to the amendment, and the document has been continuously of record since February 10, 1982, the validity of the 1982 Amendment is entitled to all of the presumptions of documents being of record for all of these years.

7. The 1995 Amendment (evidenced by Plaintiffs Exhibit 3) contains mandatory language as stated above regarding Paragraph 13, and recites the corporate purposes of the homeowners' *association* as being for the benefit of all of the property owners and that actions to be taken are for the common good of the homeowners' association.

8. For years after Plaintiff purchased his property in the Evergreen Highlands Subdivision, membership in the

homeowners' association was voluntary. Plaintiff testified that before he bought his property, he checked to ensure that the homeowners' association was voluntary -meaning that the homeowners' association did not have the authority to levy mandatory dues or require anything of the property owners. Plaintiff also testified that he would never have joined the homeowners' association had it required mandatory membership. Further, Plaintiff testified that he was philosophically opposed to any mandatory assessments and payments requirements. Plaintiff also testified that from 1986 until 1991, he fished in the lake and parked in the common areas of the Evergreen Highlands Association. Plaintiff also admitted to hiking in the park area of the subdivision and playing tennis on the tennis courts on a limited basis.

9. Plaintiff testified that he quit paying dues after 1991 because he learned that the homeowners' association had been declared defunct. Plaintiff testified that at present he only uses the common areas of the of the homeowners' association to walk his dog and on other occasions to walk in the park. Part of the purpose and function of the homeowners' association is to cut weeds and keep the common park area in good shape. Plaintiff admitted that keeping up and maintaining the common areas benefits all of the property owners, including himself.

10. The Court finds and concludes that Plaintiff could have learned of the restrictions contained in the covenants, and it was reasonable for Plaintiff to anticipate

restrictions in subdivisions such as the Evergreen Highlands Association. The Court further finds and concludes as a matter of law that because the 1972 Covenants and the 1982 Amendment were recorded in the Jefferson County Clerk and Recorder's Office, Plaintiff had knowledge of the language in the covenants providing for the amendment and change of the restrictions in the covenants.

11. The main issue in this case is whether the recorded covenants state that they may be changed or modified in any manner. Plaintiff contends that the language in the covenants, 'change or modify" cannot be interpreted to allow for the addition of new covenants, and the words do not permit the covenants to require mandatory membership in the homeowners' association and the levying of dues, as urged by Defendant herein.

12. It is the Court's responsibility to determine Colorado law applicable to this case by determining what the Colorado Supreme Court would decide is the law in this case when and if the issues contained herein reach the Court.

13. The Court finds and concludes that the case of *Wind mere Homeowners Association, Inc.* v. *McCue,* 1999 MT 292 (Mont. 1999) is analogous to this case. *Windmere* holds that a covenant allowing an amendment of its restrictions permits the homeowners' association to assess lot owners with new or unexpected restrictions which are not contained or contemplated in the original covenants.

The purpose of the amendment to the covenants in *Win dm* ere was to build a road, and require the lot owners to pay their share of the construction. The party opposing the homeowners association, Mr. Cue, the plaintiff, did not want the road built and did not want to be forced to pay for the construction of the road. The Montana Supreme Court decided that even though the amendment to the covenants was an unexpected restriction, the plaintiff, Mr. McCue, was bound by the amendment.

14. The Court also finds and concludes that the case of *Ticor Title Insurance Company* v. *Rancho Santa Fe Association,* 223 Cal.Rptr. 175 (Cal.App. 4 Dist. 1986), is analogous *to* this case. In *Ticor,* the California Court of Appeals determined that if covenants contain the language "change or modify," then such language permits the covenants to be made more restrictive that the original covenants. The Court finds and concludes that such reasoning gets the issue in focus in this case.

15. The Court finds and concludes that when and if this case or another case with these issues goes before the Colorado Supreme Court, then the Colorado Supreme Court will find *Win dm ere* and *Ticor* persuasive since they are more analogous than any other case found by the Court herein.

16. The Court sympathizes with Plaintiffs feeling that he should be able to do with his property as he pleases without interference from anyone else. Property rights are one of the reasons our country was founded. However,

the Court finds and concludes that the Colorado Supreme Court will find that in instances such as in this case, where homeowners organize and have activities of doing things for the common good of all owners in the subdivision, the will of the majority will prevail at times over the interests of the individual property owners.

17. The Court finds and concludes that this case is similar to the circumstances in the case of *Euclid* v. *Amber Realty,* 272 U.S. 365 (1926). In *Euclid,* the United States Supreme Court affirmed the importance of individual property rights, and that people have a right to use their property as they choose. However, the Supreme Court upheld zoning ordinances that provide that a person can only have certain kinds of properties in certain areas. The Court believes that the issue in *Euclid was* whether there could be commercial buildings in places zoned for residential uses. The Supreme Court stated, in effect, that although it is a transgression of property rights to dictate its use, at times this must occur if we are all to coexist and get along as our country becomes more urban.

18. The Court finds and concludes that this is an appropriate case for a declaratory judgment, as requested by Defendant.

ORDER FOR JUDGMENT:

The Court hereby ORDERS as follows:

1. The Court enters judgment in favor of Defendant and against Plaintiff upon Plaintiffs Complaint to quiet title and dismisses it in the entirety. The Court enters judgment in favor of Defendant and against Plaintiff upon Defendant's First and Second Counterclaims for declaratory judgment and an adjudication of rights between the parties pursuant to C.R.C.P. 105, and hereby orders, adjudges and decrees that all of Defendant's covenants are valid and enforceable and that Plaintiff must comply with the covenants in the same manner as all other property owners in the subdivision. Because Defendant's Third and Fourth Counterclaims for breach of implied contract and unjust enrichment were alternative theories of recovery, the Court declines to rule upon these counterclaims.

2. The Court enters judgment against Plaintiff and in favor of Defendant that Plaintiff must pay to Defendant all of the assessments and dues which have been levied on all of the property owners from December of 1995 forward when such assessments became mandatory, in the amount of $50 per year the same as any other property owner.

3. The Court enters judgment against Defendant and in favor of Plaintiff upon Defendant's request for an award of attorney's fees on the basis that Plaintiffs lawsuit is groundless and frivolous. Plaintiff has his beliefs and that the legal issue is clear that Defendant should prevail, but

the Court finds and concludes that this is not a frivolous lawsuit and that no attorney's fees shall be awarded.

4. The Court enters judgment against Plaintiff and in favor of Defendant for an award of Defendant's costs reasonably incurred in this action. If a bill of costs is served upon opposing counsel and submitted to the Court, the Court will consider the amount of the award of costs at such time.

It is SO ORDERED.

DATED this 21 day of July 2000.

BY THE COURT:

DISTRICT COURT JUDGE ("s/Tom Woodford")

SUPREME COURT, STATE OF COLORADO **Colorado State Judicial Building** **2 East 14th Avenue, 4th Floor Denver CO 80203**	
Colorado Court of Appeals **Judges Ney, Metzger, and Taubman** **Case No. 00 CA 1586** **Jefferson County District Court** **Judge Thomas Woodford** **Case No. 98 CV 3811**	
Petitioner: EVERGREEN HIGHLANDS ASSOCIATION, **A Colorado nonprofit corporation** **Respondent: ROBERT A. WEST**	**Case No. 02 SC 242**
Robert A. West **7042 Silverhorn Drive** **Evergreen, CO 80439** **Phone Number: 303-674-5756** **FAX Number:** **E-mail: solverks@yhaoo.com** **Atty. Reg. #: Pro Se**	
PETITION FOR REHEARING OF RESPONDENT ROBERT A. WEST	

Petition for Rehearing

On rehearing Respondent will show that this case is about weather or not a majority of property owners in respondents subdivision can convert the design of the subdivision from a highly democratic contractually based covenant controlled community design, to a non-democratic private corporation common interest ownership design, by creating a new covenant, and forcing respondent, who does not accept such a conversion, to become a member in that corporation, obey new restrictions related to the use of his property, relinquish his exclusive right to the enforcement of the covenants that are a part of his property, and agree to a transfer of his covenants, without just compensation, to the corporation for subsequent enforcement against respondent and other property owners. Respondent must also agree to surrender respondent's right to due process in any and all proceedings to settle disputes between respondent and all other subdivision residential property owners, even when the corporation does not own any property in the subdivision and therefore does not fit any legal definition of a Common Interest Community.

This case is not about what implications can be found in the words "change" and "modify" in order to justify the act of creating a new covenant. It is about a private corporation seeking to obtain a public partner in the

taking of private property without just compensation, in violation of both the Colorado Constitution and the 14th amendment to the Constitution of the United States, and the elimination of the 14th amendment right to due process of all property owners in the subdivision, seeking to settle property disputes between themselves.

Here are some facts, **all of which are documented in the record of this case**, and elements of law that the Court will want to examine and give serious consideration in a rehearing.

1. Covenant Controlled Community

The original declaration created a covenant controlled community. Such a community is not a legal fiction, is not a matter of interpretation, or implication, it is a matter of fact, and on rehearing, respondent will delineate all the components that categorize the community as covenant controlled by all accepted definitions, legal and otherwise. Including the specific design of a voluntary membership neighborhood **recreation** association with members from **several other** separately filed subdivisions, and having no connection to the Evergreen Highlands Unit IV covenant controlled subdivision (EHU4CCS). Petitioner Association is clearly excluded, in both the Platt and the covenants, from being a party to the covenants. The example, in Respondent's answer brief, of a private, independent golf club in a residential subdivision, is an important example of the nature of the EHU4CCS, where

there is **no common ownership of any common property**. There are many such residential designs where land in the subdivision is totally owned and maintained by a corporation whose corporate members live elsewhere, but use the land owned by the corporation (in fact several times in the past, a 9 hole golf course has been proposed for the park property located in the Evergreen Highlands Unit IV subdivision). In such subdivisions there is covenant control between properties, but no "common ownership" between subdivision lot owners and what is essentially a corporate commercial property owner that derives profit from the corporate owned land. This is the nature of the EHU4CCS. On rehearing it will be shown that the Petitioner Association rents the land for events, receives profits in return, and corporate members from other subdivisions decide how to spend those profits.

EHU4CCS property owners, who are members of the Association have little control over such corporate rental decisions because more than two thirds of the members of the Association are lot owners in other subdivisions, with their own sets of covenants, yet control the vote on these issues. This other subdivision voting majority can go so far as to restrict the use of, and the access to, the park property, by any EHU4CCS property owner, at any time, while dispensing use and access to other corporation members who do not live in the EHU4CCS. Before the

incorporation of this new mandatory membership Association. The former corporation's membership policies held that while EHU4CCS lot owners, and the lot owners of other separately filed subdivisions, could "join the club" so to speak, they were not automatically members by virtue of the purchase of a lot in any subdivision.. Nor did they obtain any property interest in the park property by virtue of their becoming a member of the corporation. Consequently, even the loose use of the words "homeowner association" found on the Platt do not imply a CIC, since such an organization, if voluntary, and without covenant rights, and with no undivided ownership specified in the deeds of subdivision lot owners, is merely a local neighborhood club. This is the case with the current corporate Petitioner Association which derives the bulk of its membership from other separately filed subdivisions. These facts are well documented in the record of this case and will be pointed to and explained on rehearing.

2. Absence of a Common interest

There is no "common interest" or "common ownership" that can be divined or defined. No person or organization has title to the "park" property in the EHU4CCS. Significantly, lot owner deeds are absent of any "undivided ownership interest" in any "common property." More importantly, the only deed that exists for the "Park property" was quitclaimed to the **original**

Evergreen Highlands Association. That Association was terminated by the Colorado Secretary of State on 01-01-89 for failure to submit annual reports. For four years no legally incorporated Association of any kind existed in the EHU4CCS. The current Petitioner Association was incorporated on 01-21-93 by 12 local property owners having no authority to represent any lot owners in their respective subdivisions, and no authority from the original developers of the EHU4CCS. Eleven of those incorporators were property owners in other separately filed subdivisions. The only deed to the "park" property is in the name of the original Evergreen Highlands Association. Since the officers of that original corporation failed in their fiduciary responsibility to transfer the assets of the original corporation to any other corporation, the property remains today **devoid of ownership.**.

3. Absence of a Valid Contract

Respondent will show on rehearing, that the proposed new Covenant signed by 74% of EHU4CCS property owners, is an "express contract", lacking any consideration, is not a valid contract, and that the missing contract element of consideration cannot be "implied." Petitioner Association could have given lot owners an undivided interest in the "Park" property in exchange for the rights they sought from lot owners, but they chose not to do so.

4. "Takings"

In the last paragraph of the Appeals Court decision, the Court stated that Respondent claimed that there were 14th amendment issues to be considered, but since these issues were not brought up at the trial court level, the Court would not consider them on appeal. However, the 14th amendment issues of right to property and due process only became an actual cause of action when the trial court, as an agent or component of the State became a party to the Petitioner's attempt at a private "taking" by authorizing the "taking." This, of course, occurred as a result of the trial, so the imposition of new restrictions and consequent devaluation of Respondent's property value could not be claimed as 14th amendment issues during the trial. The Court of appeals was the proper venue to consider these issues and the court was in error to exclude these issues from consideration. But now, the Supreme Court has full knowledge regarding these issues because the error committed by the Appellate court is documented in the Appellate Court's decision. The Supreme Court now has an opportunity to give full consideration to the 14th amendment issues that have become a live consequence of the Trial Court's decision.

On rehearing, Respondent will detail the nature of the public "taking" that is a 14th amendment violation by the State, and the private "taking" by Petitioner which is a violation of the **Colorado Constitution/ARTICLE II**

BILL OF RIGHTS/Section 14. On rehearing Respondent will show that covenants "that run with the land" are real property. And that any material change to Respondent's covenants(e.g. addition of a new covenant that converts the subdivision from Covenant controlled to CIC) without Respondent's consent, is as much a change to Respondent's real property as would be a change in the physical meets and bounds, and is a violation of Respondent's 14th amendment rights and Colorado law. Any change that diminishes Respondent's **exclusive right** to enforce his covenants is a taking of Respondent's property and an elimination of, or diminution of, and interference with, his 14th amendment right to property and Due Process.

On rehearing Respondent will show why the "takings" issue is also the reason why "change" or "modify" only applies to "said restrictions" and does not allow the creation of new restrictions. The imposition of new restrictions on property will produce a devaluation of property and force litigation to resolve the compensation issue for a public and private "taking" of property. There are no new restrictions that can be applied to Respondent's property unless Respondent agrees to their imposition. Even if it is for the "public good" Respondent must be fairly compensated for the devaluation of his property.

The covenant controlled communities of Colorado are legitimate legal arrangements designed to promote democratic forms of community association while maintaining controls on land use that will preserve investments. This is a delicate balance with which Fascist governments and private corporations need not be concerned. The legislature, with passage of the Colorado Common Interest Ownership Act (CCIOA), whose constitutionality has yet to be questioned, never meant the legislation to be an instrument of conversion of covenant controlled communities, because such an application would be a violation of the 14th amendment and a "taking."

4. "An implied common interest community"

The Court's creation and application to this case of an instrument called an "implied common interest community" is inappropriate for several reasons. On rehearing Respondent will show that a check of dates will verify that the EHU4CCS was created before the Colorado legislature passed the CCIOA. That being the case, it is not possible or logical that the EHA could have been an Implied CIC upon creation, when a entity called a CIC had not yet been defined by the legislature. Also, the legislature created "opt in" provisions for those communities created before the act. So if the Legislature expressly created "opt in" provisions, then it must have done so because it believed that the inclusion of

subdivisions could or should not be achieved "by implication." Finally, the Legislature passed the "Colorado Common Interest Ownership Act." It did not pass a "Colorado Common Interest Community Act." The "Ownership Act" requires a common ownership interest in community property, not simply a common interest in anything. There is no common ownership interest and there is no community property in EHU4CCS. There is only private property, owned by a former corporation, that is now deceased.

Several other items in the record invalidate the finding that Petitioner Association deserves a special invented status as an "implied common interest community."

- The court understands that the original Association was a voluntary membership association, but the Court does not seem to understand that it was specifically designed as a multi-subdivision community **Recreation Association** serving several covenant controlled subdivisions. The EHU4CCS was not designed as a singular homeowner association. The Court also does not seem to understand that the current Petitioner Association is a new Ad-hoc corporation with no connection whatsoever to the original (EHA) association. That Association was terminated by the Colorado Secretary of State. The current Petitioner Association is a new corporation, **without any assets**, formed by an ad-hoc group of

property owners from other subdivisions, long after Respondent purchased his property. Respondent took ownership of his property subject to the original Declaration (on or about 1973) and the AOI and by-laws of the original Association. The AOI and by-laws created by Petitioner Association have no authority equal to or greater than the original Declaration. The existence of the two separate and unrelated corporations is well documented in the record.

- The Court does not seem to understand that neither Respondent, nor the current EHA corporation has title to the "park" property. The Court is aware that a Quit claim deed gave ownership to the original EHA, but the court is not aware that, in a failure of fiduciary responsibility, that asset was never transferred to the current EHA by officers of the original EHA, as required by the original AOI. The Court goes to great length to explain why property owners should contribute to the taxes, maintenance and upkeep of "Common Property", but fails to understand that there is no "Common Property" owned by any of the parties involved in this case. It would be bizarre at best, if Respondent could be legally compelled, by property owners from other subdivisions, to pay taxes on property that no one owns. The Petitioner can voluntarily pay taxes on this property until the cows

come home. Such voluntary payments, however, while they may imply ownership, do not confer ownership.

- The Court states that the EHA achieved a 75% agreement on the new covenant. This is a claim, made by the petitioner, that the Court has apparently accepted. However, Respondent has proof, in the record, that at least one signatory included in the 75% consensus did not own the property on the date they signed the covenant agreement, and took title several days later. That signature is invalid, and is material since there are no additional agreements beyond 74%. Therefore, the 75% requirement to "change" or "modify" was never achieved.

On rehearing Respondent will show that Petitioner Association is a corporation formed long after respondent purchased his property, with no special rights of succession or any connection to the original Declarants, and that the corporation's AOI and by-laws command no special replacement right over the original declaration of the EHU4CCS. Respondent did not take ownership of his property subject to Petitioner's AOI and by-laws. Additionally, that as an ad-hoc multi-subdivision entity, the Petitioner Association is devoid of any legitimacy or authority to claim any legal status as some kind of mandatory membership common interest ownership community homeowner association of the EHU4CCS.

Most important, on rehearing, Respondent will show that this is not a simple minded case about paying dues. This is a complex case about the freedom to choose the kind of community one wants to live in, and to be secure in that choice through recourse to the law. Respondent, like thousands of other Colorado citizens, chose to purchase property in a covenant controlled community. This is a highly democratic form of community association where independent property owners define their community and landowner relationships by contract. The resulting community design strikes a balance between control that protects investment, and equality that enhances opportunities for full **and equal** participation and the preservation of constitutionally guaranteed due process and property rights. Only with such a design do property owners have an opportunity build a fully democratic community while retaining control over their real property investment, through the exclusive right of covenant enforcement. The existence of a voluntary membership recreation association is an important instrument for building social relations, but it is, by design, legally benign in settling covenant disputes between property owners. It is only property owners themselves with full due process of law that litigate solutions. This is a legitimate legal arrangement that maximizes independent property ownership while balancing individual land use with community land use goals. This is the kind of democratic

community in which respondent purchased property and which is clearly defined by the original declaration in the record of this case. That some lot owners wish to sacrifice such an opportunity for democratic living, for a non-democratic corporate form that provides only a small degree of investment protection, is a sad comment on how money has replaced democratic associations in their value set. They should have bought property in a corporate controlled subdivision.

5. Incorrect Statements found in the Court's Decision

Found under the following headings:

II Facts and Procedural History

"The Association holds title to..." The record shows that the Petitioner Association is not a successor in interest, does not have a deed, and does not hold title to any property!!

"75% of..... lot owners voted.... The record shows that the 75% agreement was never achieved, and there was never a "vote", as in "private voting machine", Contracts were signed under direct pressure in one-on-one engagements between property owners and **"THE ASSOCIATION."**

3B

"The declarations made clear.....that the Association.....had the power to impose annual membership or use fees on lot owners"

The original voluntary Association could only impose dues on voluntary members that were also lot owners in one of several separately filed subdivisions, They could not impose membership or use fees on lot owners that were not members.

In conclusion, Respondent respectfully requests that the Court grant a rehearing so that it may give more consideration to the complexity of the facts in this case, and so that it may affirm Respondent's right to due process by considering the 14th amendment, and Colorado constitutional issues that the Appellate Court declined to consider.

COLORADO COURT OF APPEALS

Court Address:
2 East 14th Avenue, Suite 300 Denver. CO 80203.

District Court, County of Jefferson, State of Colorado
Honorable Judge Thomas Woodford Case No.98 CV 3811

Plaintiff-Appellant: ROBERT A. WEST

Vs.

Defendant-Appellee: EVERGREEN HIGHLANDS ASSOCIATION, a Colorado non-profit corporation

Attorney:
Name: Stephen A. Groome, Esq. Case No.2000 CA 1586
Address: 23711 Pleasant Park Road Conifer, CO 80433

Telephone: 303-697-6933 Fax #: 303-697-4915 Atty. Reg. # 17195

APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT COUNTY OF JEFFERSON, STATE OF COLORADO THE HONORABLE THOMAS WOODFORD, DISTRICT COURT JUDGE

STEPHEN A. GROOME, ESQ. Reg. No.17195 23711
Pleasant Park Road Conifer, CO 80433 303-697-6933

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COLORADO COURT OF APPEALS

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APPELLANT'S OPENING BRIEF

Plaintiff-Appellant Robert A. West ("Mr. West") respectfully submits the following Opening Brief:

STATEMENT OF THE ISSUES

1. What is the meaning as a matter of law of the provision in the pre-existing recorded covenants, which states that "the owners of seventy-five per cent of the lots which are subject to these covenants may release all or part of the land so restricted from anyone or more of said covenants, or may change or modify anyone or more of said restrictions. ..."?

2. Does the trial court's interpretation of the above quoted language, purporting to allow 75% of property owners to enact completely new covenants binding upon non-consenting property owners, constitute a wrongful impairment and/or taking of Mr. West's property rights?

STATEMENT OF THE CASE

Mr. West commenced this action seeking to quiet the title to his property of, and have declared invalid, a certain document recorded with the Jefferson County, Colorado Clerk and Recorder on December 29, 1995, at Reception

No. FO16538 entitled 'WRITTEN CONSENT TO AMEND PROTECTIVE COVENANTS FOR EVERGREEN HIGHLANDS -UNIT 4 PREPARED AND RECOMMENDED BY THE EVERGREEN HIGHLANDS ASSOCIATION' (the "1995 Amendment") (Plaintiffs Exhibit 3). The Defendant-Appellee, Evergreen Highlands Association, (the "Evergreen Highlands Association") prepared and recorded this document. In short, the 1995 Amendment, signed by 75% of the subdivision lot owners, purports to add new protective covenants binding upon all subdivision lot owners, including Mr .West, who did not sign it.

The new protective covenants purport to do the following:

a. Authorize the Evergreen Highlands Association to enforce the covenants as amended;

b. Require all lot owners to be members of the Evergreen Highlands Association; c. Require all lot owners to pay dues to the Evergreen Highlands Association;

d. Authorize the Evergreen Highlands Association to place liens against lots for non-payment of dues;

e. Authorize the Evergreen Highlands Association to use dues to enforce the covenants and maintain common facilities;

f. Authorize the Evergreen Highlands Association to adopt rules and regulations for park area use by all lot owners.

The primary issue in this case concerns the interpretation of a provision in the pre- existing restrictive covenants, which states that "the owners of seventy-five per cent of the lots which are subject to these covenants may release all or part of the land so

restricted from anyone or more of said covenants, or may change or modify anyone or more of said restrictions. ..."

Does this language permit seventy-five percent (75%) of the subdivision lot

owners to enact new restrictive covenants and make them binding upon non-consenting property owners?

Following a two (2) hour trial to the Court, the Court ruled in the affirmative to the above question. On July 21, 2000, the Court executed the Order for Judgment and copies were mailed to the attorneys of record. On August 22,2900, Mr. West filed timely a Notice of Appeal with Colorado Court of Appeals.

Both parties agree that this is a case of first impression in the appellant courts for the State of Colorado.

STATEMENT OF FACTS

Prior to trial, the parties stipulated to the following facts, all of which were set forth in the Trial Management Order (Record, Vol. I, pp. 102-103) as well as the

Findings of Fact, Conclusions of Law, Order for Judgment (Record, Vol. I, pp. 115~116):

1. Since February 28, 1986, Plaintiff has owned the real property described as Lot 23, Evergreen Highlands Unit 4, County of Jefferson, State of Colorado (the "Plaintiff's Property").

2. Evergreen Highlands Unit 4 is a subdivision platted in 1972 and located in
Jefferson County, Colorado. Plaintiff purchased his property subject to the 1972 Plat of Evergreen Highlands Unit 4.
3. Plaintiff purchased his property subject to Protective Covenants For Evergreen Highlands Unit 4 (the" 1972 Protective Covenants"), recorded with the Jefferson County Clerk and Recorder on November 6, 1972.
4. On February 10, 1982, a document entitled 'Amendment to Declaration of Protective Covenants For Evergreen Highlands Unit 4' (the "1982 Amendment")

was recorded with the Jefferson County, Colorado, Clerk and Recorder.

5. The Plaintiff purchased his property subject to the 1982 Amendment.

6. The Defendant is the EVERGREEN HIGHLANDS ASSOCIATION, a Colorado Nonprofit Corporation (the" Association"), which purports to be the homeowners association for the lot owners in the Evergreen Highlands Unit 4 subdivision.

7. On or about December 29,1995, at Reception No. F016538, the Defendant
caused to be recorded with Jefferson County, Colorado, Clerk and Recorder a document entitled 'WRITTEN CONSENT TO AMEND PROTECTVE COVENANTS FOR EVERGREEN HIGHLANDS -UNIT 4 PREP ARED AND RECOMMENDED BY THE EVERGREEN HIGHLANDS ASSOCIATION' (the "1995 Amendment").

8. The 1995 Amendment was not signed by the Plaintiff.

9. The 1995 Amendment purports to add a ~ Article 16 to the existing covenants, doing the following:
a. Authorize the Association to enforce the covenants as amended; b. Require all lot owners to be members of the Association; c. Require all lot owners to pay dues to the Association;

d. Authorize the Association to place liens against lots for non-payment of dues; e. Authorize the Association to use dues to enforce the covenants and maintain common facilities;
f. Authorize the Association to adopt rules and regulations for park area use by all lot owners.
10. The Association is attempting to enforce the provisions of the 1995 Amendment. It has notified the Plaintiff via certified letter that the Defendant's By Laws require it to record a lien against the Plaintiffs Property unless the Plaintiff pays the Defendant annual dues.
In addition to the above stipulated facts, at trial the following facts were established by testimony:
Prior to closing on the purchase of his residence in 1986, Mr. West investigated the status of the Evergreen Highlands Association to determine if membership was mandatory or voluntary. (Hearing Transcript, p. 4, lines 9-25, p. 5, lines 1-16). Mr. West's determination that the Evergreen Highlands Association was a voluntary membership organization was a material consideration in his decision to complete the purchase of his residence. (Hearing Transcript, p. 5, lines 8-25, p. 6, line 1).
Mr. West was a voluntary member of the Evergreen Highlands Association from

1986 until approximately 1991. (Hearing Transcript, p. 7, lines 12-25, p. 8, lines 1-4).

SUMMARY OF THE ARGUMENT

Paragraph 13 of the 1972 Protective Covenants (and the 1982 Amendment) does 001 permit 75% of the lot owners to add new restrictive covenants binding upon all subdivision lot owners.

Under the general rules of construction for interpreting covenants:

1. Construction of covenants is a question of law which are viewed de novo by the Colorado appellate courts.

2. Protective covenants that are clear on their face must be enforced as written. 3. Any doubts as to the meaning of restrictive covenants should be resolved against restricting use of land and in favor of its free and unrestricted use.

4. In construing a covenant, all doubts must be resolved against the restriction and in favor of free and unrestricted use of property .

The words 'change or modify anyone or more of said restrictions r do not imply the creation of new powers or authority. Appellate courts from other jurisdictions in

interpreting similar covenant language contain two common themes:

1. They use the same basic rules of covenant construction as established under Colorado law.

2. The rulings turned on how narrowly or how broadly the subject covenant language was written. Covenant provisions with broad amendment language generally were interpreted as permitting new covenants to be passed by the stated majority of property owners. On the other hand, covenant clauses with narrowly written amendment language (such as the lan~lZe in Question in this case) were interpreted to require the enactment of new covenants only with the consent of ~ property owners--not by the stated majority vote.

The 1982 Amendment is invalid on its face since the purported recorded

amendment was not signed by 75% of the lot owners as required by the 1972 Protective

Covenants. In addition, the recitals that precede the 1982 Amendment are not part of the covenants and cannot be cited as authority for the 1995 Amendment.

The trial court's interpretation of paragraph 13 of the 1972 Protective Covenants, purporting to allow 75% of the property owners to enact new covenants binding upon

non-consenting property owners (including Mr. West), constitutes a wrongful impairment and/or taking of Mr. West's property rights in violation of the 14th Amendment to the U.S. Constitution.

ARGUMENT

I. PARAGRAPH 13 OF THE 1972 PROTECTIVE COVENANTS (AND THE 1982 AMENDMENT) DOES NOT PERMIT 75 % OF THE LOT OWNERS TO ADD NEW RESTRICTIVE COVENANTS BINDING UPON ALL SUBDIVISION LOT OWNERS.

A. *General Rules of Construction in Interpreting Covenants.*

1. Construction of covenants is a question of law which are viewed de novo by

the Colorado appellate courts. *Rossman* v. *Seasons at Tara Rado Association,* 943 P. 2d 34, (Colo. App. 1996).

2. Protective covenants that are clear on their face must be enforced as written. *Rossman* v. *Seasons at Tara Rado Association,. Greenbrier-Cloverdale Homeowners*

Assoc. v. *Baca,* 763 P .2d 1,2 (Colo. App. 1988); *Double D Manor, Inc.* v. *Evergreen Meadows Homeowners' Association,* 773 P.2d 1046 (Colo. 1989).

3. Any doubts as to the meaning of restrictive covenants should be resolved against restricting use of land and in favor of its free and W1festricted use. *Greenbrier-Cloverdale Homeowners Assoc.* v. *Baca,* supra. *Flaks* v. *Wichman,* 128 Colo. 45, 260 P . 2d 737 (1953).

4. In construing a covenant, all doubts must be resolved against the restriction and in favor of free and unrestricted use of property. *Double D Manor, Inc.* v. *Evergreen Meadows Homeowners' Association,* supra.

B. *The words 'change or modify any one or more of said restrictions' do not imply the creation of new powers or authority.*

Paragraph 13 of the 1972 Protective Covenants (Plaintiffs Exhibit 1) as well as paragraph 13 of the 1982 Amendment (Plaintiffs Exhibit 2) reads as follows:

"These covenants shall run with the land and shall bind all parties and all persons claiming under them for a period of ten years from the date of filing in the Office of the County Clerk and Recorder of Jefferson County, Colorado, and shall automatically be continued thereafter for successive periods of ten years; provided, however, that the owners of seventy-five per cent of the lots which are subject to these covenants ! I release all or part of the land so restricted from anyone or more of said restrictions

or may change or modify an one or more of said restrictions, by executing and acknowledging an appropriate agreement or agreements in writing for such purposes and filing same in the Office of the County Clerk and Recorder of Jefferson County, Colorado~" (emphasis added)

" A provision that any of the restrictions imposed may be modified or amended does not authorize any new or additional restrictions to be imposed, but authorizes existing restrictions to be made less harsh." 26 C.J:S. *Deeds,* Section 168, pages 1160- 1161.

Although Colorado appellate courts have not been asked to interpret similar restrictive covenant language, various other jurisdictions have done so. These cases, discussed in detail below, contain several common themes.

First, other jurisdictions have the same basic rules of covenant construction as established under Colorado law (discussed above).

And second, in interpreting covenant provisions similar to the language before

this court, the rulings from other jurisdictions turned on how narrowly or how broadly the subject covenant language was written. Covenant provisions with broad amendment language generally were interpreted as permitting new covenants to be passed by the

stated majority of property owners. On the other hand, covenant clauses with narrowly

written amendment language were interpreted to require the enactment of new covenants only with the consent of!!11 property owners--not by the stated majority vote.

It is respectfully submitted that the language Mr. West is asking this Court to interpret falls squarely within the 'narrowly written' category .

I. CASES INTERPRETING NARROWL y DRAFTED COVENANTS:

The facts in *Lakeland Property Owners Association* v. *Larson* 459 N .E. 2d 1164 (Ill. App.1984), are quite similar to the facts of the case before this Court. In that case, the pre-existing restrictive covenants allowed a majority of lot owners "to change the said covenants in whole or in part. II The homeowners association recorded 'Revised Deed Restrictions' signed by a majority of the lot owners adding new restrictive covenants purporting to require membership and the payment of dues by all lot owners.

Citing numerous cases from other jurisdictions, the court held that the Revised

Deed Restriction was not valid. "The provision permitting the change of covenants found

in the instant deed clearly directs itself to changes of existing covenants, not the adding of new covenants which have no relation to existing ones. This provision precedes the covenant that states that it permits changes to 'the following covenants,' and permits a majority of the lots owners to change 'the said covenants.' !I (p. 1169).

In *Boyles* v. *Hausmann,* 517 N. W.2d 610 (Neb. 1994), the Nebraska Supreme Court was asked to interpret covenant language, which allowed property owners to change "these covenants, water use regulations, restrictions and conditions,"

provided that a majority agreed to "change same in whole or in part." (p.616). The Court ruled that this narrowly written language did not allow the majority to bind non-consenting property owners to a new covenant containing new set back restrictions.

In *Van Deusen* v. *Ruth* 125 S. W. 2d 1 (Mo.,1939), the Missouri Supreme Court reached the same conclusion. The pre-existing covenant language read: " All or any of the foregoing provisions or restrictions may be modified, amended, released or

extinguished" by 75% of the lot owners. An attempt by 75% of the lot owners to add new restrictive covenants was declared invalid. At page 3, the court stated as follows: !I 'Modify' ordinarily is not used in the sense of completely setting aside the
thing to be modified. The word implies no power to create or bring into
existence, but only power to change or vary in some particular an already created or legally existing thing. The power to modify anything does not imply a power to substitute a thing entirely different.

Similarly, in *Caughlin Ranch HOA* v. *Caughlin Club* 849 P. 2d 310,312, (NV . 1993) the Nevada Supreme Court ruled that pre-existing covenants which provided for

"amendments" to the restrictive covenants refer to amendments to existing covenants as opposed to the creation ofnew covenants unrelated to the original covenants.

In the case before this Court, the 1972 Protective Covenants permit 75% of the lot owners to "change or modify anyone or more of said restrictions." The words

'change or modify' clearly refer to the change or modification of 'any one or more of said restrictions.' These words do nQ1 imply that 75% of the lot owners

may create new covenants unrelated to the existing ones. The creation of new covenants would require the consent of ALL property owners.

2. CASES INTERPRETING BROADL y DRAFTED COVENANTS:

The case of *Windemere Homeowner Association, Inc.* v. *McCue,* 1999 MI 292 (MONT .1999), is a recent case from another jurisdiction interpreting covenant language pertaining to amending existing covenants. The case also contains an extensive discussion of related cases from other jurisdictions, which have applied the 'narrowly

worded--versus--broadly worded' covenant analysis.

In the *Windemere* case the Montana Supreme Court was asked to interpret the following covenant provision relative to amendments:

"The covenants, conditions, restrictions and uses created and
established herein may be waived, abandoned, terminated, modified, altered or changed as to the whole of the said real property or any portion thereof with the written consent of the owners of sixty-five percent (65%) of the votes from the real property described herein above. Each acre shall be entitled to one (I) vote in any election to decide any issues involving waiver, abandonment, termination, modification, alteration or change of the restrictive covenants as to a whole of the real property or any portion thereof. .

Following an extensive 'narrowly worded--versus--broadly worded' covenant analysis of other cases, the Montana Supreme held that "the language of the original declaration of restrictive covenants was broad enough to authorize" the amendment enacted by the sixty five percent majority; and that the "covenant language used in all three cases *[Lake/and, Caugh/in, andBoy/es]* is markedly different from that used here."

In *Sunday Canyon Property Owners Association* v. *Annett,* 978 S. W.2d 654 (Tex. App. 1998), the Texas Court of Appeals interpreted language similar to that in the *Windemere* Case. The *Sunday Canyon* covenants read as follows:

"The covenants, conditions, agreements, reservations, restrictions
and charges created and established herein for the benefit of said
subdivision and each lot therein may be waived, abandoned, terminated, modified, altered or changed as to the whole of said tract or any portion thereof, at any time with written consent of 51% of the owners of the lots in the tract. "

The Court interpreted this covenant amendment language as being sufficiently broad to allow 51% of the lot owners to enact virtually any new covenant.

II. THE 1982 AMENDMENT IS ALSO INVALID (A) BECAUSE THE 1982

AMENDMENT W AS NOT SIGNED BY 75 % OF THE LOT OWNERS [ONL Y ONE PERSON SIGNED IT AS 'PRESIDENT'] AS REQUIRED BY THE 1972 PROTECTIVE COVENANTS; AND BECAUSE (B) THE RECITALS WHICH PRECEDE THE PURPORTED COVENANT AMENDMENTS ARE NOT PART OF THE COVENANTS.

For the reasons set forth below, the 1982 Amendment is invalid on its face. However, note that since paragraph 13 of the 1972 Protective Covenants and paragraph 13 of the 1982 Amendment are identical, Mr. West is only challenging the validity of the 1982 Amendment to the extent that the Evergreen Highlands Association argues that the recitals to the 1982 Amendment somehow validate the 1995 Amendment.

A. *The* 1982 *Amendment is invalid on its face since the purported recorded amendment was not signed by* 75 % *of the lot owners as required by the* 1972 *Protective Covenants.*

The pertinent part of the 1972 Protective Covenants (paragraph 13) (Plaintiffs Exhibit 1) reads as follows:

". ..the owners of seventy-five per cent of the lots which are subject to these covenants. ..may change or modify anyone or more of said restrictions, by executing and acknowledging an appropriate agreement or agreements in writing for such purposes and filing same in the Office of the County Clerk and Recorder of Jefferson County, Colorado."

The 1972 Protective Covenants clearly require 75% of the lot owners to execute and acknowledge any change or modification and file it with Jefferson County Clerk and Recorder. Since the 1982 Amendment (Plaintiffs Exhibit 2) was signed by only one individual as 'President', it is invalid and of no force and effect. [Again. since the 1982 Amendment simply adopts the 1972 Protective Covenants verbatim, Mr. West's

challenge to the validity of the 1982 Amendment only pertains to the recitals to the extent the Evergreen Highlands Association cites the 1982 Amendment as authority for the validity of the 1995 Amendment.]

B. *The recitals that precede the* 1982 *Amendment are not part of the covenants*

and cannot be cited as authority for the 1995 *Amendment.*

The 1982 Amendment (Plaintiffs Exhibit 2) consists of 5 paragraphs of recitals followed by a covenant 'amendment' which adopts the 1972 Protective Covenants virtually in their entirety (including paragraph 13).

The Evergreen Highlands Association has argued that the language in the recitals, which states that all lot owners in the subdivision "are members" of the homeowners association, somehow affirms their position taken in the 1995 Amendment (Plaintiffs Exhibit 3) that all lot owners '~ be members' whether they want to or not.

However, under Colorado law, recitals in any agreement, including recitals in a deed, are not deemed part of the

agreement and cannot extend contractual obligations. *Las Animas Consol. Canal Co. v. Hinderlider* 68 P. 2d 564 (Colo. 1937), *Engineered Data Products,. Inc. v. Nova Office Furniture Inc.* 849 F. Supp. 1412 (D. Colo. 1994). Therefore, even if the 1982 Amendment had been validly executed by 75% of the lot owners, the language contained in its recitals cannot be used to legalize the enactment of new covenants binding upon non-consenting property owners.

DI. THE TRIAL COURT'S INTERPRETATION OF PARAGRAPH 13 OF THE 1972 PROTECTIVE COVENANTS, PURPORTING TO ALLOW 75 % OF THE PROPERTY OWNERS TO ENACT NEW COVENANTS BINDING UPON NON-CONSENTING PROPERTY OWNERS (INCLUDING MR. WEST) CONSTITUTES A WRONGFUL IMPAIRMENT AND/OR TAKING OF MR. WEST'S PROPERTY RIGHTS IN VIOLA TION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

Section 1 of the Amendment XIV of the United States Constitution. in pertinent part, reads as follows:

". ..No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens on the United States; nor shall any
State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

In this case, the undisputed facts established that the Evergreen Highlands Subdivision (Unit 4) was platted in 1972 (Record, Vol. I, pp. 102-103 & 115-116); that Mr. West purchased his property in the subdivision in 1986, which included certain rights, restrictions, and obligations as set forth in the 1972 Protective Covenants (Record, Vol. I, pp. 102-103 & 115-116); that the Evergreen Highlands Association was not
a party to or bound by the 1972 Protective Covenants, only lot owners were (Record, Plaintiffs Exhibit 1); prior to closing on his purchase ofhis property, Mr. West investigated the status of the Evergreen Highlands Association and determined that it was operated as a voluntary membership organization [presumably since 1972] (Hearing Transcript, p. 4, lines 9-25, p. 5, lines 1-16); that this was a material consideration in Mr. West's decision to complete his purchase and move into the subdivision (Hearing Transcript, p. 5, lines 8-25, p. 6, line 1); that in 1995, the Evergreen Highlands Association. by the recording of the 1995 Amendment, attempted to change the organization to require mandatory membership, the mandatory payment of dues, as well as empower itself to lien the property of non-paying property owners and enforce all recorded covenants, including the new ones. (Record, Vol. I, pp. 102-103 & 115-116; Plaintiffs Exhibit 3). Interpreting paragraph 13 of the 1972 Protective Covenants to allow the imposition of these additional obligations upon Mr.

West, which are beyond those contemplated by the clear and ordinary meaning of those words, constitutes a violation of the protections guaranteed under the 14th Amendment.

CONCLUSION

Based on the foregoing, Mr. West respectfully requests that this Court issue a ruling reversing the judgment entered in the Jefferson County District Court and declaring the 1995 Amendment (and the 1982 Amendment's recitals) to be invalid and quieting the title to Mr. West's Property from said documents.

Respectfully submitted this 22nd day of March, 2001.

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No. 02SC242
Court of Appeals Case No. 00CA1586 (11/23/01)

EVERGREEN HIGHLANDS ASSOCIATION,
a Colorado non-profit corporation,
Petitioner,
v.
ROBERT A. WEST,
Respondent.

Petition for Writ of Certiorari GRANTED. EN BANC.

SUMMARY OF ISSUES:

Where a planned community's covenants empower a certain percentage of the owners to "change or modify any one or more" of the covenants, may the specified percentage of owners adopt a covenant requiring all owners to pay assessments to the homeowner association?

Does a planned community's homeowner association have the implied power to collect assessments from all owners to defray the cost of maintaining common areas?

WRITTEN CONSENT TO AMEND PROTECTIVE COVENANTS FOR EVERGREEN HIGHLANDS – UNIT 4 PREPARED AND RECOMMENDED BY THE EVERGREEN HIGHLANDS ASSOCIATION

1. The undersigned Is the owner of record of the real property Indicated below, located within the Evergreen Highlands - Unit 4 subdivision, ("Unit 4"); and

2. The undersigned Is familiar with the existing Protective Covenants for Unit 4 recorded at Book 2442, page 941 and amended at reception number 82008986 of the records or the Jefferson County Clerk and Recorder, (the Covenants") as such Covenants are applicable to the owner's property; and

3. The undersigned Is aware that the Covenants require the written consent of the owners of seventy-five percent (75%) of the lots within Unit 4 to change or modify the Covenants; and

4. The undersigned has read and is familiar with the proposed amendment to the Covenants stated below and wishes to give written consent to the same, but except as amended below, the Covenants shall remain In full force and effect;

NOW, THEREFORE, the undersigned, as a property owner of record within the Evergreen Highlands. Unit 4 subdivision, hereby approves and gives consent to the below stated amendment to the Covenants by the addition or the following new Article 16:

16. The Evergreen Highlands Association, a Colorado nonprofit corporation, (the " Association"), has been organized to pursue the purposes or these Protective Covenants. The Association Is successor In Interest to Evergreen Estates, Inc. and Evergreen Highlands Associates the developers of Evergreen Highlands Units 1 through 5 who originally adopted these Protective Covenants. The Association may per1orm all duties and powers provided for In this Declaration and contemplated for a lot owner's association for the Evergreen Highlands Subdivision Units 1 through 5.

a. All lot owners shall be members of the Association.

b. Each lot owner shall pay to the Association such dues adopted by the Association as provided in Its Articles of Incorporation and Bylaws.

c. The Association may Impose and enforce hens against each lot for which dues are unpaid.

d. Dues may be expended for Association purposes Including administering and enforcing the Declaration, and operating and maintaining common facilities.

e. Common facilities or the Association, Including the common park area dedicated by the Plat for Evergreen Highlands. Unit 4, recorded In Plat Book 371 Page 43, Jefferson County, shall be for the use of all lot owners within Evergreen Highlands Units 1 through 5, subject to rules and regulations adopted by the Association.